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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 636

JAMES WALTER CARTER, PETITIONER,

vs.

CARTER COAL COMPANY, GEORGE L. CARTER, AS VICE-PRESIDENT AND A DIRECTOR OF SAID COMPANY, ET AL.

No. 651

GUY T. HELVERING ET AL., PETITIONERS,

vs.

JAMES WALTER CARTER ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITIONS FOR CERTIORARI FILED DECEMBER 16, 1935.

CERTIORARI GRANTED DECEMBER 20, 1935.
DECEMBER 23, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 636

JAMES WALTER CARTER, PETITIONER,

vs.

CARTER COAL COMPANY, GEORGE L. CARTER, AS VICE-PRESIDENT AND A DIRECTOR OF SAID COMPANY, ET AL.

No.

GUY T. HELVERING, INDIVIDUALLY AND AS COMMISSIONER OF INTERNAL REVENUE OF THE UNITED STATES, ET AL., PETITIONERS,

vs.

JAMES WALTER CARTER ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

VOL. I.

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IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

No. 59374 In Equity

JAMES WALTER CARTER,

Address: Stevenson, Md., Plaintiff,

vs.

CARTER COAL COMPANY,
GEORGE L. CARTER as Vice-President and a Director of said Company;
C. A. HALL as Secretary-Treasurer and a Director of said Company,
JOHN CALLAHAN,
JOSEPH W. GORMAN and
WALTER S. DENHAM as Vice-Presidents of said Company;
GUY T. HELVERING, individually and as Commissioner of Internal Revenue of the United States;
M. HAMPTON MAGRUDER, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland;
CLARENCE C. KEISER, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland;
JOHN B. COLPOYS, individually and as United States Marshal in and for the District of Columbia;
HOMER S. CUMMINGS, individually and as Attorney General of the United States;
STANLEY REED, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and
LESLIE C. GARNETT, individually and as United States Attorney in and for the District of Columbia, Defendants.

[Caption omitted.]

[fol. 2] BILL OF COMPLAINT FOR INJUNCTION AND PETITION FOR DECLARATORY JUDGMENT

The plaintiff, James Walter Carter, brings this, his bill of complaint, against Carter Coal Company, George L.

Carter as Vice-President and a Director of said Company, C. A. Hall as Secretary-Treasurer and a Director of said Company; John Callahan, Joseph W. Gorman and Walter C. Denham as Vice-Presidents of said Company; Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; Lewis M. Milbourne, individually and as Acting Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, and alleges:

1. The plaintiff, James Walter Carter, is a citizen and resident of the State of Maryland and is the President, a Director and a shareholder in the defendant corporation Carter Coal Company.

2. The defendant Carter Coal Company is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located in Washington, District of Columbia, and is a citizen of the United States of America and of the State of Delaware.

3. The defendant George L. Carter is a citizen and resident of the District of Columbia and is a Vice-President and Director of Carter Coal Company.

4. The defendant C. A. Hall is a citizen and resident of the District of Columbia and is Secretary-Treasurer and a Director of Carter Coal Company.

5. The defendant John Callahan is a citizen and resident of the State of Maine; the defendant Joseph W. Gorman is a citizen and resident of the State of Massachusetts; and the defendant Walter C. Denham is a citizen and resident of the State of Kentucky. The defendants John Callahan, Joseph W. Gorman and Walter C. Denham are Vice-Presidents of Carter Coal Company.

6. The defendant Guy T. Helvering is a citizen and resident of the State of Kansas, and is the duly qualified and acting Commissioner of Internal Revenue of the United States.

7. The defendant Lewis M. Milbourne is a citizen and resident of the State of Maryland and is the duly qualified and acting Collector of Internal Revenue of the United States in and for the Collection District of Maryland; and the defendant Clarence C. Keiser is a citizen and resident of the District of Columbia and is the duly qualified and acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland.

8. The defendant John B. Colpoys is a citizen and resident of the District of Columbia and is the duly qualified and acting United States Marshal in and for the District of Columbia.

[fol. 3] 9. The defendant Homer S. Cummings is a citizen and resident of the State of Connecticut and is the duly qualified and acting Attorney General of the United States; the defendant Stanley Reed is a citizen and resident of the State of Kentucky, and is the duly qualified and acting Solicitor General of the United States, and the Acting Attorney General of the United States (U. S. Code, Title 5, sec. 293); and the defendant Leslie C. Garnett is a citizen and resident of the District of Columbia, and is the duly qualified and acting United States Attorney in and for the District of Columbia.

10. This suit arises under the Constitution and laws of the United States and involves the validity, construction, application and enforcement of the Act of Congress approved August 30, 1935, known as the "Bituminous Coal Conservation Act of 1935."

11. The matter in controversy in this suit exceeds the sum or value of $3,000, exclusive of interest and costs, and this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

12. The plaintiff is now, and was at the time of the transactions herein complained of, a stockholder of Carter Coal Company, holding 15,000 shares of Class A common stock

(of one dollar par value) and 9,733 shares of preferred stock (of one hundred dollars par value)..

13. The defendant Carter Coal Company is, among other things, duly authorized by law to mine, quarry and prepare for market and buy and sell and otherwise acquire and dispose of coal, iron, rock, stone, clay and all minerals, metals and timber. Said defendant is engaged in the business of producing and selling bituminous coal at its mines located in McDowell County, State of West Virginia, and in Tazewell County, State of Virginia. It also owns coal properties in Bell and Knox Counties, State of Kentucky but does not itself currently operate them. Substantially all of the coal produced by said defendant is sold to the buyers free on board cars at the defendant's said mines within the States of Virginia and West Virginia, as aforesaid. A substantial portion of the coal mined and sold by the defendant Carter Coal Company is thereafter transported in interstate commerce.

14. In the conduct of its said business of producing and selling bituminous coal within the States of Virginia and West Virginia, the defendant Carter Coal Company is subject to the regulation of statutes of the said States which provide for the health, safety and welfare of its employees and of the public. Such statutes, supervised by Departments, Commissions or Bureaus, constitute comprehensive codes making detailed regulations for the protection and promotion of the health, safety and welfare of the public and of said defendant's employees in the operation of its said business, including the qualifications of employees and of places where they shall be permitted to work in mines (Virginia Code of 1930, Chapter 76, Sections 1835 to 1887, [fol. 4] inclusive; Code of West Virginia, 1931, Chapter 22, Articles 1 and 2); provisions regulating the methods of weighing and measuring coal and the payment of employees therefor, including the employment of weighmen and checkweighmen (Code of West Virginia, 1931, Chapter 22, Article 2, Sections 73-78); and provisions requiring the payment of compensation to injured workmen and provision for their vocational rehabilitation and education (Virginia, Code of 1930, Chapters 76(A) and 76(B), Sections 1887(1) to 1887(85), inclusive; Code of West Vir-

ginia, 1931, Chapter 23, Article I to V, inclusive). In the carrying on of the said business of producing and selling bituminous coal within the States aforesaid, the said defendant is regularly subjected to the payment of heavy taxes to the said States and to subdivisions thereof.

15. The laws of the State of Delaware require that the business of the defendant, Carter Coal Company, "shall be managed by a Board of Directors." (Laws of Delaware, 1929, Chapter 135, section 4.) In conformity therewith, the By-laws of the defendant Carter Coal Company provide that "The property, affairs and business of the Corporation shall be managed by the Board of Directors," said Board to consist of three directors, who shall act by majority vote (By-laws, Art. V, Secs. 1, 2, 12).

16. The Bituminous Coal Conservation Act of 1935, aforesaid, among other things, provides for a Bituminous Coal Code which subjects the conduct of the business of producers of bituminous coal who accept it to regulation by the Federal Government through the National Bituminous Coal Commission and other agencies specified in the Act, including the regulation, among other things, of the prices at which coal may be sold by such producers and the wages and hours of labor of their employees. The said statute imposes upon bituminous coal producers who do not accept and obligate themselves to comply with the Code provided for by said Act a tax upon the sale or other disposition of all coal mined of fifteen per centum of the sale price at the mine, while producers of bituminous coal who accept the Code thereby become entitled to a drawback in the form of a credit equivalent to ninety per centum of the amount of said tax. The purpose and object sought to be accomplished by the said statute, as appears from the face thereof, is to force all coal producers to assent to and become members of the said Code, through the imposition of a heavy and confiscatory penalty under the guise of a tax, to be imposed solely upon producers not so assenting and becoming Code members; and plaintiff avers that the practical effect of said penalty will be to make it impossible for the defendant Carter Coal Company successfully to operate its business without assenting to and becoming a member of said Code.

17. The plaintiff is advised by counsel and charges that said Bituminous Coal Conservation Act of 1935 is illegal and void in that it violates the Constitution of the United States, in the following, as well as in other, respects:

[fol. 5]. (1) The said Act is, in purpose, in essence, and on its face, an attempt to regulate matters not committed to the Federal Government by the Constitution, by means of the granting or withholding of a heavy penalty, called a tax, and it cannot be sustained as an exercise of the taxing power of the Federal Government.

(2) The said Act cannot be sustained under the Commerce Clause, since the regulations to which Carter Coal Company must submit as a condition to the forbearance of the tax constitute regulations of its activities in the conduct of its wholly intrastate business as aforesaid, the regulation of which does not constitute a regulation of commerce among the several States.

(3) The said Act is violative of the Tenth Amendment to the Constitution of the United States, in that it constitutes an invasion by the Federal Government of fields of regulation reserved by that Amendment to the States or to the People.

(4) The said Act is violative of the Fifth Amendment to the Constitution of the United States in that

(a) It attempts to deprive Carter Coal Company without due process of law of the liberty guaranteed to it by that Amendment;

(b) It attempts to deprive Carter Coal Company and the plaintiff of their property rights, including subsisting contract rights, without due process of law;

(c) It attempts to take the private property of Carter Coal Company for a public use without the payment of just compensation;

(d) It is wholly arbitrary, capricious and unequal.

18. On August 30, 1935, the plaintiff delivered to the Company and to the Directors thereof a formal demand that the Company should not comply with the Bituminous Coal Conservation Act, should not become a member of the Code nor pay the taxes provided for in said Act, and should

contest the validity of said statute and said Code in appropriate judicial proceedings. Said demand is in the following words and figures, to-wit:

August 30, 1935.

"To Carter Coal Company and the Board of Directors thereof:

"It is my opinion, based upon advice of counsel, that the Bituminous Coal Conservation Act of 1935 and particularly the sections thereof which purport to regulate the conduct of the business of this Company and those which are designed to coerce this Company into acceptance of the Bituminous Coal Code provided for in that Act, are unconstitutional and void and cannot lawfully be enforced as against [fol. 6] Carter Coal Company; that acceptance of the said Code and compliance therewith by Carter Coal Company would deprive the Company and its stockholders of their constitutional and property rights and would constitute a surrender of the most vital functions of the Company and its directors in the management of the business of the said Company and would be ultra vires; and that the payment of the so-called taxes provided in the said Act would constitute a waste and misappropriation of the assets of the Company.

"It is also my opinion that acceptance of the said Code would be detrimental to the interests of the Company, would increase the costs of the Company and the selling prices of the coal produced by it, which would result in a loss of customers to competitors, and destruction of the business of the Company.

"As President of the Company I suggest, and as a shareholder therein I demand, that the Company and its Directors shall refrain from complying with the Act, shall refrain from becoming a member of the Code provided for therein, and shall refuse to pay the taxes imposed thereby.

"I further suggest and demand that the Company and its Directors shall contest the constitutionality of said Act and prevent an unconstitutional and improper diversion of the assets of the Company in the payment of the taxes provided by said Act, and that the Company shall apply to a court of competent jurisdiction to determine the liability of the Company under said Act, and take such steps as

shall be necessary to protect the rights of the Company and its shareholders.

(Signed) James Walter Carter."

19. The plaintiff called a meeting of the Board of Directors to consider his said demand and presented the demand to the Board of Directors at that meeting on August 30, 1935. The Board thereupon adopted the following resolution, against which plaintiff, as one of the members of the Board of Directors, cast his vote, to-wit:

"Whereas it is the unanimous opinion of the Members of this Board that the Bituminous Coal Conservation Act of 1935, approved August 30, 1935, is unconstitutional and is economically unsound, and that it would adversely affect the business of this Company and the interests of its shareholders for this Company to accept and obligate itself to comply with the Code provided for therein; and

"Whereas it is nevertheless the opinion of a majority of this Board that the Company must accept the Code provided for by said Act, because the extreme penalty for failure to accept the same, in the form of a 15% tax on its gross sales, would result in serious damage to the Company and might result in its bankruptcy.

"Resolved that the Company shall accept the Code provided for in said Act, and that the proper officers of the Company are hereby authorized and directed to take all action which may be necessary in the premises."

20. The plaintiff thereupon called a special meeting of the shareholders of the Company, as provided in the By-laws thereof, to consider his demand and the resolution of the Board of Directors aforesaid. Said meeting was duly [fol. 7] held on August 30, 1935, and the following resolution was adopted by a majority in interest of the voting stockholders of the Company as provided in the By-laws, against which the plaintiff and another cast their votes, to-wit:

"Whereas this meeting has considered a demand addressed to the Company by its President and a preamble and resolution of the Board of Directors adopted on August 30, 1935, upon consideration of said demand;

"Whereas a majority in interest of the holders of voting shares of this Company fully agrees with all of the conclu-

sions set forth in said preamble and resolution of the Board of Directors; and

"Whereas if the Company does not assent to the Code the exaction of the tax imposed by the Bituminous Coal Conservation Act of 1935 would ruin the Company financially and probably result in its bankruptcy;

"Be it resolved that the said resolution of the Board of Directors of this Company, adopted on August 30, 1935, be and it hereby is in all respects approved, ratified and confirmed."

21. In view of the premises aforesaid the plaintiff alleges that the said Company intends to comply with the provisions of the aforesaid Act and to accept and bind itself to comply with the provisions of the Code provided for therein, for the reason that the Act, although in form giving said Company a choice whether to assent to said Code or not, in effect and on its face compels said Company to become a Member thereof as the price of freedom from a ruinous pecuniary penalty. The plaintiff has made all possible effort to obtain such action as he desires on the part of the Directors and shareholders, but, for the reasons aforesaid, the Company will, nevertheless, comply with the statute and accept the Code unless restrained by this Honorable Court.

22. The Internal Revenue Laws of the United States impose upon the defendant Guy T. Helvering, as Commissioner of Internal Revenue of the United States, superintendence of the assessment and collection of all duties and taxes imposed by any law providing for internal revenue (U. S. Code, Title 26, sec. 2), including the direct assessment of taxes and the superintendence of the activities of Collectors of Internal Revenue (U. S. Code, Title 26, secs. 97, 102) and the Bituminous Coal Conservation Act of 1935 makes it the duty of the said defendant to promulgate regulations for the assessment and collection of the taxes provided for by said Act. The plaintiff alleges that, unless restrained by this Honorable Court, the said defendant will assess and collect from the defendant Carter Coal Company the taxes imposed by said Bituminous Coal Conservation Act of 1935, or will cause the several Collectors or Deputy Collectors of Internal Revenue of the United States, or other of his subordinates or assistants, or other Gov-

ernment officers, to assess and collect the tax from Carter Coal Company and to that end defendant will issue his regulations and instructions to his subordinates, or other officials, as aforesaid.

[fol. 8] 23. The defendant Lewis M. Milbourne, as Acting Collector of Internal Revenue of the United States in and for the Collection District of Maryland, is charged by law with the duty of collecting United States Internal Revenue taxes within the District of Columbia and is required by statute to "see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with" within said district (U. S. Code, Title 26, secs. 34, 26); and the defendant Clarence C. Keiser, as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland, is likewise charged by law with the duty of collecting United States Internal Revenue taxes within the District of Columbia (U. S. Code, Title 26, sec 29); and the plaintiff alleges that said defendants will, under the regulations and instructions of the Commissioner of Internal Revenue, collect from the defendant Carter Coal Company the tax imposed by the Bituminous Coal Conservation Act of 1935, unless restrained by this Honorable Court.

24. It is the duty of the defendants Homer S. Cummings, as Attorney General of the United States, and Stanley Reed, as Solicitor General and Acting Attorney General of the United States (U. S. Code, Title 5, sec. 293), to enforce the statutes of the United States by all legal means, and it is the duty of the defendant, Leslie C. Garnett, as United States District Attorney in and for the District of Columbia, under the supervision and direction of the defendant Homer S. Cummings similarly to enforce the statutes of the United States within the District of Columbia (U. S. Code, Title 5, sec. 317, Title 28, sec. 481); and it is the intention of the said defendants to enforce the provisions of the Bituminous Coal Conservation Act of 1935 against the defendant Carter Coal Company and they will do so unless restrained by this Honorable Court.

25. The defendant John B. Colpoys is charged by law with the duty of executing distraint warrants issued by the defendants Lewis M. Milbourne and Clarence C. Keiser, and your complainants allege that, unless restrained by this

Honorable Court, the defendant John B. Colpoys will execute and enforce distraint warrants issued by the said defendants Milbourne or Keiser for the purpose of enforcing the penalty provided in the Bituminous Coal Conservation Act of 1935 against the defendant Carter Coal Company and its property.

26. Plaintiff further alleges that he is without any remedy in a court of law to prevent the threatened illegal, unconstitutional and ultra vires act of the defendant Carter Coal Company, and the defendant officers and Directors thereof, in assenting to and binding Carter Coal Company to become a Member of the Code provided for by the Bituminous Coal Conservation Act of 1935. Plaintiff further alleges that should said defendant become a Member of said Code it will thereby become obligated to sell its product in conformity with the regulations, and at the prices, provided for thereunder, and plaintiff is informed and believes, and apprehends and charges, that the result of compliance [fol. 9] by said defendant with said provisions will be a substantial loss and diversion of the business of said Carter Coal Company. Plaintiff further alleges and charges that by assenting to and becoming a Member of said Code said defendant will engage and obligate itself not to sell or deliver any coal at less than the minimum or more than the maximum prices fixed pursuant thereto regardless of the prices fixed in the existing contracts of said defendant, thereby subjecting itself to the risk of incurring large liabilities in damages for breach of its existing contracts with its customers, with whom it has many contracts outstanding. Plaintiff is also advised, and charges, that by assenting to the said Code and becoming a Member thereof, said Carter Coal Company will be acting in violation of the Anti-trust Laws of the United States, of the State of Virginia (Virginia Code, 1930, Chapter 185A, Constitution of Virginia, Sec. 165), and of other States, and will subject itself to criminal and civil liability therefor. The pecuniary losses caused as aforesaid will lessen and diminish the equity of the shareholders in said Carter Coal Company and the interests of the plaintiff in said Company as shareholders therein will be greatly and irreparably injured.

27. The plaintiff further alleges that if this Honorable Court should enjoin the Carter Coal Company from assent-

ing to or becoming a Member of the said Code, as hereinafter prayed, there exists no adequate remedy at law to protect the constitutional and property rights of said Carter Coal Company and of the plaintiff against the assessment, collection, or payment of the so-called tax of 15% of the sale price of all bituminous coal produced, imposed by the Act aforesaid upon those who do not become Members of the Code. The plaintiff alleges that for the calendar year 1934 defendant Carter Coal Company sold approximately 2,126,046 tons of bituminous coal; that the sales price of said coal realized by said Company at the mine was approximately $3,918,266, from which the said Company realized a net profit of approximately $323,998 in the operation of its business; that had the 15% tax imposed by the Act aforesaid been in effect during said period, said Company would have been thereby obligated to the payment of a tax of approximately $587,740, which would have resulted in completely wiping out all net profit from the operation of its business and in the creation of a net loss of $263,750 from said operation for that year. Neither in the present year, nor at any time for many years prior thereto, to-wit, at least five years last past, have the net profits of Carter Coal Company equalled 15% of the total sales price received by said Company at the mine. Upon information and belief, plaintiff alleges that Carter Coal Company cannot successfully and profitably continue in the business of producing and selling coal if compelled to pay a tax of 15% on the sales price thereof at its mines, particularly if a substantial number of its competitors are required to pay a tax of but 1½% on said sales price; and the plaintiff avers that the payment or collection of the said illegal and confiscatory tax of 15% will ruin the said defendant financially and will inevitably result in the closing of the mines of said defendant and the loss of its customers and of its valuable good will, long before the rights of the plaintiff and of said defendant can be vindicated in a suit to [fol. 10] recover taxes paid under the said Act; and that the payment or collection of said tax will destroy the business of said defendant, cause its bankruptcy and force its employees to seek employment elsewhere—to prevent which there exists no remedy save in this Honorable Court.

Wherefore the plaintiff, being without remedy in the premises, except in a Court of Equity, prays:

1. That writs of subpoena be issued, directed to the defendants herein, commanding them to appear and make full, true and complete answer to this complaint, but not under oath (answers under oath being expressly waived), and to abide by and perform such orders and decrees as the Court may make in the premises.

2. That the Court order this cause to be heard upon application for a preliminary injunction (which is hereby made) within ten days after the service hereof on said defendants, and that the Court upon such application and hearing issue a preliminary injunction: (a) enjoining the defendant Carter Coal Company, and the defendants George L. Carter as Vice-President and a Director of said Company, C. A. Hall as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter C. Denham as Vice-Presidents of said Company, pending final hearing of this case, from executing or filing an acceptance of the Bituminous Coal Code, from paying any tax attempted to be imposed upon the defendant Carter Coal Company pursuant to the Bituminous Coal Conservation Act of 1935, and from complying with the said Act; (b) enjoining the defendant Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States, his agents, assistants, deputies or employees, pending final hearing of this cause, from in any manner, directly or indirectly, assessing or collecting from the defendant Carter Coal Company the taxes imposed by said Bituminous Coal Conservation Act of 1935: from causing any Collector or Deputy Collector of Internal Revenue of the United States, or any of said defendant's subordinates or assistants, or any other Government officer, to assess or collect said taxes from defendant Carter Coal Company; and from issuing any regulations or instructions to the Collectors or Deputy Collectors of Internal Revenue or to said defendant's subordinates or assistants, or to any other Government officials, respecting the collection of said taxes from defendant Carter Coal Company; (c) enjoining the defendants Lewis M. Milbourne, individually and as Acting Collector of Internal Revenue of the United States in and for the Collection District of Maryland, Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue in and for Division No. 2 of the

Collection District of Maryland, and John B. Colpoys, individually and as United States Marshal in and for the District of Columbia, their agents, assistants, deputies and employees, pending final hearing of this case, from collecting, or attempting to collect, directly or indirectly, from Carter Coal Company any tax or imposition purporting to be levied or assessed against the plaintiff under the Bitumi- [fol. 11] nous Coal Conservation Act of 1935 on account of the sale or other disposal of bituminous coal produced by Carter Coal Company as described in this complaint; from seizing any of the property of said Company herein because the said tax has not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceeding against the property of said Company because the said tax has not been paid; from enforcing any of the remedies provided for the collection of internal revenue of the United States against said Company, its property, officers or agents with respect to the said tax; and (d) enjoining the defendants Homer S. Cummings, individually and as Attorney General of the United States, Stanley Reed, individually and Solicitor General and Acting Attorney General of the United States, and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, their agents, assistants, deputies and employees, pending final hearing of this case, from attempting to collect by suits or prosecutions, or otherwise, any tax, penalty or fine, mentioned in, or imposed by said Act, from defendant Carter Coal Company or any of its officers or Directors and from taking any steps whatever, legal or otherwise, to induce, coerce or compel the defendant Carter Coal Company or its officers or Directors to comply with the provisions of the Bituminous Coal Conservation Act of 1935 or the Code provided for thereunder.

3. That upon final hearing of this cause the Court order, adjudge and decree: (a) that the defendant Carter Coal Company and the defendants George L. Carter, as Vice-President and a Director of said Company, C. A. Hall, as Secretary-Treasurer and a director of said Company, and John Callahan, Joseph W. Gorman and Walter C. Denham, as Vice-Presidents of said Company be perpetually enjoined from filing an acceptance of the Code aforesaid, from paying any tax imposed upon defendant Carter Coal Com-

pany under the supposed authority of the Bituminous Coal Conservation Act of 1935, and from complying with the provisions of said statute or said Code; (b) that the defendant Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States, his agents, assistants, deputies or employees, be perpetually enjoined from in any manner, directly or indirectly, assessing or collecting from the defendant Carter Coal Company the taxes imposed by said Bituminous Coal Conservation Act of 1935; from causing any Collector or Deputy Collector of Internal Revenue of the United States, or any of said defendant's subordinates or assistants, or any other Government officer, to assess or collect said taxes from defendant Carter Coal Company; and from issuing any regulations or instructions to the Collectors or Deputy Collectors of Internal Revenue or to said defendant's subordinates or assistants or to any other Government officials respecting the collection of said taxes from defendant Carter Coal Company; (c) that the defendant Lewis M. Milbourne, individually and as acting Collector of Internal Revenue of the United States for the Collection District of Maryland, Clarence C. Keiser, individually and as Acting Chief Field [fol. 12] Deputy Collector of Internal Revenue of the United States for Division No. 2 of the Collection District of Maryland, and John B. Colpoys, individually and as United States Marshal in and for the District of Columbia, their agents, assistants, deputies and employees, be perpetually enjoined from directly or indirectly collecting or attempting to collect from Carter Coal Company any tax or imposition purporting to be levied or assessed against the said Company under the said Bituminous Coal Conservation Act of 1935 on account of the sale or other disposal of bituminous coal produced by said Company as described in this complaint; from seizing any of the property of said Company because the said tax has not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceeding against the property of said Company because the said tax has not been paid; from enforcing any of the remedies provided for the collection of internal revenue of the United States against said Company, its property, officers or agents with respect to the said tax; and (d) that the defendants Homer S. Cummings,

individually and as Attorney General of the United States, Stanley Reed, individually and as Solicitor General and Acting Attorney General of the United States, and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, their agents, assistants, deputies and employees, be perpetually enjoined from directly or indirectly attempting to collect by suits or prosecutions, or otherwise, any tax, penalty or fine mentioned in or imposed by said Act from defendant Carter Coal Company or any of its officers or directors, and from taking any steps, legal or otherwise, to induce, coerce or compel the said defendant Carter Coal Company or its officers or directors to file an acceptance of said Code or to comply with the provisions of said Act.

4. That, upon final hearing, this Court shall declare, and order, adjudge and decree, that the Bituminous Coal Conservation Act of 1935, approved August 30, 1935, is unconstitutional and void, and is unenforcible as against Carter Coal Company or any of the officers or Directors thereof.

5. That plaintiff have such other, further and general relief as the nature of the case may require and the Court may deem just and proper in the premises.

(Signed) James Walter Carter, James Walter Carter, by (Signed) Richard H. Wilmer, His Attorney.

Cravath, de Gersdorff, Swaine & Wood, 15 Broad Street, New York, N. Y.; Frederick H. Wood, 15 Broad Street, New York, N. Y.; (Signed) Richard H. Wilmer, Transportation Building, Washington, D. C., Attorneys for the Plaintiff.

[fol. 13] *Duly sworn to by Richard H. Wilmer and James W. Carter. Jurats omitted in printing.*

[fol. 14] IN SUPREME COURT OF DISTRICT OF COLUMBIA

RULE TO SHOW CAUSE—Filed August 31, 1935

In consideration of the verified bill of complaint filed herein the 31st day of August, 1935, it is by the Court this 31st day of August, 1935,

Adjudged, ordered and decreed that the above-named defendants and each of them appear in this Court on the 16th day of September, 1935, at the hour of ten o'clock a. m., provided a copy of said bill of complaint and of this order shall be served on them on or before September 11, 1935, and show cause, if any they have, why an order should not be made and entered herein, pendente lite, to wit: (a) enjoining the defendant Carter Coal Company, and the defendants George L. Carter as Vice-President and a Director of said Company, C. A. Hall as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter C. Denham as Vice-Presidents of said Company, pending final hearing of this case, from executing or filing an acceptance of the Bituminous Coal Code, from paying any tax attempted to be imposed upon the defendant Carter Coal Company pursuant to the Bituminous Coal Conservation Act of 1935, and from complying with the said Act; (b) enjoining the defendant Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States, his agents, assistants, deputies or employees, pending final hearing of this cause, from in any manner, directly or indirectly, assessing or collecting from the defendant Carter Coal Company the taxes imposed by said Bituminous Coal Conservation Act of 1935; from causing any Collector or Deputy Collector of Internal Revenue of the United States, or any of said defendant's subordi- [fol. 15] nates or assistants, or any other Government officer, to assess or collect said taxes from defendant Carter Coal Company; and from issuing any regulations or instructions to the Collectors or Deputy Collectors of Internal Revenue or to said defendant's subordinates or assistants, or to any other Government officials, respecting the collection of said taxes from defendant Carter Coal Company; (c) enjoining the defendants Lewis M. Milbourne, individually and as Acting Collector of Internal Revenue of the United States in and for the Collection District of Maryland, Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue in and for Division No. 2 of the Collection District of Maryland, and John B. Colpoys, individually and as United States Marshal in and for the District of Columbia, their agents, assistants, deputies and employees, pending final hearing

of this case, from collecting, or attempting to collect, directly or indirectly, from Carter Coal Company any tax or imposition purporting to be levied or assessed against the complainant under the Bituminous Coal Conservation Act of 1935 on account of the sale or other disposal of bituminous coal produced by Carter Coal Company as described in this complaint; from seizing any of the property of said Company herein because the said tax has not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceeding against the property of said Company because the said tax has not been paid; from enforcing any of the remedies provided for the collection of internal revenue of the United States against said Company, its property, officers or agents with respect to the said tax; and (d) enjoining the defendants Homer [fol. 16] S. Cummings, individually and as Attorney General of the United States, Stanley Reed, individually and as Solicitor General and Acting Attorney General of the United States, and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, their agents, assistants, deputies and employees, pending final hearing of this case, from attempting to collect by suits or prosecutions, or otherwise, any tax, penalty or fine, mentioned in, or imposed by said Act, from defendant Carter Coal Company or any of its officers or Directors and from taking any steps whatever, legal or otherwise, to induce, coerce or compel the defendant Carter Coal Company or its officers or Directors to comply with the provisions of the Bituminous Coal Conservation Act of 1935 or the Code provided for thereunder.

And that said defendants also show cause why plaintiff should not have such other, further, and general relief as the nature of the case may require and the Court may deem just and proper in the premises.

Alfred A. Wheat, Chief Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION TO AMEND BILL OF COMPLAINT—Filed September 3, 1935

Now comes the plaintiff by his attorneys, Frederick H. Wood and Richard H. Wilmer, and moves the Honorable

Court to authorize and permit the amendment of the bill of complaint filed herein on the 31st day of August, 1935, in the following manner:

By adding and annexing to the bill of complaint the individual notarial verification of said bill of complaint of [fol. 17] the plaintiff, James Walter Carter.

Frederick H. Wood, Richard H. Wilmer, Attorneys for Plaintiff.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER AMENDING BILL OF COMPLAINT—Filed September 3, 1935

Upon consideration of the motion of the plaintiff filed herein on the 3rd day of September, 1935, it is by the Court this 3rd day of September, 1935,

Adjudged, ordered and decreed that the bill of complaint filed herein on the 31st day of August, 1935, be amended before service thereof is had upon the respective defendants by adding and annexing to the bill of complaint the individual notarial verification thereof of the plaintiff, James Walter Carter.

Alfred A. Wheat, Chief Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

RETURN OF DEFENDANTS GUY T. HELVERING ET AL., TO RULE TO SHOW CAUSE—Filed September 16, 1935

Come now severally defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and [fol. 18] Leslie C. Garnett, as United States Attorney in

and for the District of Columbia, and in response to the rule to show cause heretofore issued herein, respectfully show that plaintiff is not entitled to an injunction pendente lite under said rule, for the following reasons:

A. Plaintiff's application for a preliminary injunction is premature, in that

1. The tax, enforcement of which plaintiff seeks to enjoin, does not become effective until such time as the National Bituminous Coal Commission shall have formulated the Code contemplated by the Bituminous Coal Conservation Act of 1935. In no event do the taxing provisions of said Bituminous Coal Conservation Act become effective prior to November 1, 1935. The National Bituminous Coal Commission charged by said Act with the duty of formulating said Code has not as yet been appointed, qualified and organized.

2. No taxes under the provisions of said Act have been levied or assessed against the defendant Carter Coal Company, nor have any rules or regulations for the assessment or collection of such taxes been promulgated or adopted by the Commissioner of Internal Revenue, nor have any of these respondent defendants ever threatened to take any action, whatsoever, toward the assessment or collection of taxes under Section 3 of said Bituminous Coal Conservation Act against the defendant Carter Coal Company or its property.

3. Plaintiff in his bill (paragraph 27) rests his asserted right to enjoin these responding defendants on the assumption that this Court will enjoin the intended acceptance of said Code by the Carter Coal Company and that, in consequence, unless these responding defendants are also en- [fol. 19] joined, the said company will be exposed to the collection and enforcement of the full amount of said tax, without drawback of credit, by virtue of its non-acceptance of said Code pursuant to said injunction. Such prayer for injunction against said Carter Coal Company, upon the granting of which plaintiff's claim for injunction against these responding defendants is conditioned, is premature because neither the said Code nor the rules and regulations nor the maximum and minimum price schedules which may be established thereunder nor the form of acceptance of said Code contemplated by said Act have as yet been for-

mulated nor can be formulated until the appointment, qualification and organization of said National Bituminous Coal Commission and for some time thereafter; and it is therefore impossible for this Court, or for the officers, directors or shareholders of said company, to determine at the present time whether adherence to said contemplated Code by said Carter Coal Company would result in injury, irreparable or otherwise, to the interests of said company; and it is also impossible at the present time to determine whether adherence to said Code would constitute an abuse of discretion on the part of said officers, directors or shareholders; and the bill of complaint therefore fails to state sufficient grounds for injunctive relief at this time against acceptance of said Code by said Carter Coal Company.

4. Such injunction against acceptance of said Code by the Carter Coal Company, upon which injunctive relief against these responding defendants is based, would also be premature because the Bituminous Coal Conservation Act of 1935 provides a complete and adequate statutory form of [fol. 20] remedy for all of the injuries, if any, which plaintiff in said bill alleges as consequent upon acceptance by the Carter Coal Company of said Code; and the Bituminous Coal Conservation Act of 1935 expressly provides that the acceptance of the contemplated Code or of the drawback of taxes provided for in Section 3 of said Act by the Carter Coal Company shall not preclude or estop said company from contesting the constitutionality or validity of any provision of said Code and therefore such acceptance of said Code by the Carter Coal Company cannot injure said company, either irreparably or otherwise.

B. The said bill fails to disclose that either the plaintiff or the so-called defendant Carter Coal Company are threatened with immediate or any injury at the hands of these responding defendants, or any of them.

C. The said bill fails to disclose that either the plaintiff or the so-called defendant Carter Coal Company is in any immediate or any danger of suffering any injury at the hands of these defendants, or any of them, or the nature, extent or probability of the supposititious injuries to which plaintiff fears he may be subjected in the future.

D. The said bill affirmatively discloses that the so-called defendant Carter Coal Company has not availed itself of

the complete and adequate judicial and administrative remedies provided in said Bituminous Coal Conservation Act of 1935 for its protection, which said remedies are adequate.

E. In so far as said bill seeks to enjoin these responding defendants from collecting or attempting to collect such taxes as may hereafter be assessed against defendant Carter Coal Company under the provisions of Section 3 of said Bituminous Coal Conservation Act, the same cannot be maintained (a) because of the provisions of Section 3224, [fol. 21] R. S. (Title 26, § 154 U. S. C.) and (b) because to that extent this suit is a suit against the United States and the United States has not consented to be sued.

Wherefore, these responding defendants pray that plaintiff take nothing by reason of the issuance of said rule to show cause and that the same be vacated and discharged.

Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; Leslie C. Garnett, as United States Attorney in and for the District of Columbia; by John Dickinson, Assistant Attorney General, Their Attorney. John Dickinson, Assistant Attorney General; Carl McFarland, Special Assistant to the Attorney General; F. B. Critchlow, Special Assistant to the Attorney General; David A. Pine, Assistant United States Attorney; John J. Wilson, Assistant United States Attorney. Attorneys for Responding Defendants.

Duly sworn to by F. B. Critchlow. Jurat omitted in printing.

[fol. 22] IN SUPREME COURT OF DISTRICT OF COLUMBIA

RETURN OF CARTER COAL CO. ET AL. TO RULE TO SHOW CAUSE —Filed September 16, 1935

Now come Carter Coal Company, George L. Carter as Vice-President and Director of said Company, C. A. Hall as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter C. Denham as Vice-Presidents of said Company, defendants herein and as joint return to the rule to show cause entered herein on the 31st day of August, 1935, show as follows:

1. Said defendants admit that the allegations set forth in the Bill of Complaint are true and correct.

2. These defendants respectfully submit to the Court the question whether or not a temporary injunction should issue as prayed for in the Bill of Complaint, but in view of the position in which these defendants have been placed by the enactment of the Bituminous Coal Conservation Act of 1935, and of the public importance of the issues raised herein and their far reaching effect upon the coal industry and the public, as well as upon the business of these defendants, respectfully pray that this cause be set down for [fols. 23 & 24] immediate hearing on the merits.

Carter Coal Company, by C. A. Hall, Secretary-Treasurer; Geo. L. Carter, Vice-President and a Director of Carter Coal Company; C. A. Hall, Secretary-Treasurer and a Director of Carter Coal Company; John Callahan, Vice-President of Carter Coal Company; by C. A. Hall, Agent; Joseph W. Gorman, Vice-President of Carter Coal Company; by C. A. Hall, Agent; Walter C. Denham, Vice-President of Carter Coal Company; by C. A. Hall, Agent. Karl J. Hardy, Transportation Building, Washington, D. C., Attorney for Defendants, Carter Coal Company; George L. Carter, Vice-President and a Director of said Company; C. A. Hall, Secretary-Treasurer, and a Director of said Company; John Callahan, Vice-President of said Company; Joseph W. Gorman, Vice-President of said Company, and Walter C. Denham, Vice-President of said Company.

Duly sworn to by C. A. Hall et al. Jurats omitted in printing.

[fol. 25] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER DENYING PRELIMINARY INJUNCTION—Filed September 19, 1935

This cause came on to be heard at this term on rule to show cause why preliminary injunction should not issue and on returns thereto, and was argued by counsel, and, thereupon, upon consideration thereof, it is this 19 day of September, 1935,

Ordered that plaintiff's application for a preliminary injunction be, and it is, hereby denied without prejudice, and that the rule to show cause heretofore issued thereon be, and the same is, hereby vacated and discharged.

Daniel W. O'Donoghue, Justice.

Presented by F. B. Critchlow, David A. Pine, Attorneys for the Defendant Government Officers.

No objection as to form. Karl J. Hardy, Attorney for Carter Coal Co. and Its Defendant Officers. Cravath, de Gersdorff, Swaine & Wood, Frederick H. Wood, Richard H. Wilmer, Attorneys for Plaintiff.

Exception noted by plaintiff.

Daniel W. O'Donoghue, Justice.

[fol. 26] IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION FOR SUBSTITUTION—Filed September 19, 1935

Now comes the plaintiff, by his attorneys, and respectfully moves the Honorable Court that M. Hampton Magruder individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland be substituted for and in the place of defendant Lewis M. Milbourne individually and as Acting Collector of Internal Revenue of the United States in and for the Collection District of Maryland, and as grounds for said motion shows as follows:

1. That Lewis M. Milbourne, recently Acting Collector of Internal Revenue of the United States in and for the Collection District of Maryland, resigned and vacated such office on or about September 18, 1935, and was thereupon succeeded in such official capacity by M. Hampton Magruder, who was duly qualified to fill such office and has since said date acted in the capacity of Collector of Internal Revenue of the United States in and for the Collection District of Maryland.

2. That there is a substantial need for continuing this cause and substituting the successor in office of Lewis M. Milbourne as Acting Collector of Internal Revenue of the United States in and for the Collection District of Maryland.

Cravath, de Gersdorff, Swaine & Wood, Frederick H. Wood, Richard H. Wilmer, Attorneys for Plaintiff.

We consent: Karl J. Hardy, Attorney for Defendant Carter Coal Company and Its Defendant Officers. David A. Pine, Asst. U. S. Atty. F. B. Critchlow, Special Asst. to Atty. Gen., Attorneys for the Defendant, Government officers.

[fol. 27] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER SUBSTITUTING PARTY DEFENDANT—Filed September 19, 1935

Upon consideration of the motion filed herein by the plaintiff on the 19 day of September, 1935, it is by the Court this 19 day of September, 1935.

Ordered that M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland, be, and he hereby is, substituted for and in the place of Lewis M. Milbourne, individually and as Acting Collector of Internal Revenue of the United States in and for the Collection District of Maryland.

Daniel W. O'Donoghue, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ENTRY OF APPEARANCES—Filed September 19, 1935

To the Clerk of the Above-entitled Court:

Please enter the appearance of the undersigned as attorneys and solicitors for the following defendants:

Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States;

M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the collection district of Maryland;

Clarence C. Keiser, individually and as acting chief field deputy collector of internal revenue for Division No. 2 of the collection district of Maryland;

John B. Colpoys, individually and as United States Marshal in and for the District of Columbia;

[fol. 28] Homer S. Cummings, individually and as Attorney General of the United States;

Stanley Reed, individually and as acting Attorney General of the United States and as Solicitor General of the United States; and

Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia.

Dated this 19 day of September, 1935.

John Dickinson, Assistant Attorney General; Carl McFarland, Special Assistant to the Attorney General; F. B. Critchlow, Special Assistant to the Attorney General; David A. Pine, Assistant United States Attorney; John J. Wilson, Assistant United States Attorney.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

STIPULATION RE TIME TO ANSWER—Filed September 19, 1935

It is hereby stipulated that the following defendants, namely, Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the collection district of Maryland; Clarence C. Keiser, individually and as

acting chief field deputy collector of internal revenue for Division No. 2 of the collection district of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, in- [fol. 29] dividually and as Attorney General of the United States; Stanley Reed, individually and as acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, may have up to and including the 2d day of October, 1935, within which to answer or otherwise plead to plaintiff's bill of complaint herein:

Dated this 19th day of September, 1935.

John Dickinson, Assistant Attorney General; Carl McFarland, Special Assistant to the Attorney General; F. B. Critchlow, Spec. Asst. to Atty. General; David A. Pine, Assistant United States Attorney; John J. Wilson, Assistant United States Attorney; Attorneys for said Defendants. Cravath, de Gersdorff, Swaine & Wood, Frederick H. Wood, Richard H. Wilmer, Attorneys for Plaintiff.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

STIPULATION RE TIME TO ANSWER—Filed September 20, 1935

It is this 19th day of September, 1935, stipulated that the following defendants, namely, Carter Coal Company, George L. Carter as Vice-President and Director of said Company, C. A. Hall as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman [fol. 30] and Walter C. Denham as Vice-Presidents of said Company, may have up to and including the 4th day of October, 1935, within which to answer or otherwise plead to plaintiff's bill of complaint herein.

Cravath, de Gersdorff, Swaine & Wood, Frederick H. Wood, Richard H. Wilmer, Attorneys for Plaintiff; Karl J. Hardy, Attorney for Carter Coal Company and Its Defendant Officers.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

JOINT AND SEVERAL ANSWER OF DEFENDANTS GUY T. HELVERING, INDIVIDUALLY AND AS COMMISSIONER OF INTERNAL REVENUE OF THE UNITED STATES; M. HAMPTON MAGRUDER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES IN AND FOR THE COLLECTION DISTRICT OF MARYLAND; CLARENCE C. KEISER, INDIVIDUALLY AND AS ACTING CHIEF FIELD DEPUTY COLLECTOR OF INTERNAL REVENUE FOR DIVISION NO. 2 OF THE COLLECTION DISTRICT OF MARYLAND; JOHN B. COLPOYS, INDIVIDUALLY AND AS UNITED STATES MARSHAL IN AND FOR THE DISTRICT OF COLUMBIA; HOMER S. CUMMINGS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES; STANLEY REED, INDIVIDUALLY AND AS ACTING ATTORNEY GENERAL OF THE UNITED STATES AND AS SOLICITOR GENERAL OF THE UNITED STATES; AND LESLIE C. GARNETT, INDIVIDUALLY AND AS UNITED STATES ATTORNEY IN AND FOR THE DISTRICT OF COLUMBIA—Filed October 2, 1935.

Come now these defendants, reserving all manner of exceptions that may be had to the uncertainties and imperfections of plaintiff's bill of complaint and in answer thereto, or to so much thereof as they are advised is material to be answered, say:

I

1. They admit the allegations of paragraph one of said bill of complaint.

2. They admit the allegations of paragraph two of said [fol. 31] bill.

3. They admit the allegations of paragraph three of said bill.

4. They admit the allegations of paragraph four of said bill.

5. They admit the allegations of paragraph five of said bill.

6. They admit the allegations of paragraph six of said bill.

7. They admit that defendant M. Hampton Magruder, heretofore substituted herein for defendant Lewis M. Mil-

bourne, is a citizen and resident of the State of Maryland and is the duly qualified and acting Collector of Internal Revenue of the United States in and for the Collection District of Maryland; admit the remaining allegations of paragraph seven of said bill.

8. They admit the allegations of paragraph eight of said bill.

9. They admit the allegations of paragraph nine of said bill.

10. With reference to the allegations contained in paragraph ten of the bill these defendants show that said allegations are conclusions of law and that they are not required to answer the same.

11. These defendants are without knowledge concerning the matters alleged in paragraph eleven of said bill, except that defendants are informed and believe and upon such information and belief allege that this cause involves no real case or controversy between plaintiff and the defendant Carter Coal Company, its officers and directors, but is as to such parties brought for the purpose merely of obtaining [fol. 32] an advisory opinion from this Court.

12. These defendants are without knowledge concerning the matters alleged in paragraph twelve of said bill.

13. They admit the allegations contained in paragraph thirteen of said bill except that they have no knowledge as to what proportion if any of the coal produced by the Carter Coal Company is sold to buyers free on board cars at the mines of said company.

14. These defendants admit that the defendant Carter Coal Company is subject to the payment of taxes to the States of Virginia and West Virginia and to subdivisions thereof, but are without knowledge as to the burden of such taxes. With reference to the remaining allegations contained in paragraph fourteen of said bill defendants show that they are not required to make answer thereto in that the construction, validity and scope of the State statutes therein referred to, if material in this cause, are questions of law to be determined by this Honorable Court.

15. They admit the allegations of paragraph fifteen of said bill.

16. These defendants are without knowledge as to whether or not it would be possible for the defendant Carter Coal Company to operate its business successfully should it elect not to become a member of said code and to pay said tax. These defendants show that there is no reason for them to answer the remaining allegations contained in paragraph sixteen of said bill because said remaining allegations contain mere conclusions of the pleader relative to the contents and purposes of and the obligations imposed by the Bituminous Coal Conservation Act of 1935, of the actual terms and provisions of which this Court will take judicial notice.

[fol. 33] 17. These defendants show that each and every charge or allegation contained in paragraph seventeen of plaintiff's bill of complaint is a conclusion of law and that they are not required to make answer thereto. Defendants nevertheless deny each and every charge or allegation contained therein.

18. These defendants are without knowledge concerning any of the matters alleged in paragraph eighteen of said bill of complaint.

19. These defendants are without knowledge concerning any of the matters alleged in paragraph nineteen of said bill.

20. These defendants are without knowledge concerning any of the matters alleged in paragraph twenty of said bill.

21. These defendants are without knowledge concerning any of the matters alleged in paragraph twenty-one of said bill except that these defendants admit that the said Carter Coal Company intends to accept said code unless it be restrained from so doing by this Honorable Court.

22. For answer to the twenty-second paragraph of the bill of complaint defendants admit that defendant Guy T. Helvering is Commissioner of Internal Revenue of the United States and is by reason of such office charged with the performance of certain duties prescribed by law. As to the nature and extent of the duties so prescribed defendants respectfully invite the Court's attention to the statutes governing the same. Further answering said paragraph defendants aver that the taxing provisions of the Bituminous Coal Conservation Act of 1935 have not yet

become effective and that no tax whatever has been levied, assessed or imposed against the defendant Carter Coal Company under the provisions of said Act, and further [fol. 34] that no such tax whatever will in any event become subject to collection from said Carter Coal Company prior to the first day of the second succeeding month after the formulation by the National Bituminous Coal Commission of the code contemplated by said Act.

23. For answer to the twenty-third paragraph of said bill these defendants admit that defendants M. Hampton Magruder and Clarence C. Keiser are respectively Collector of Internal Revenue for the Collection District of Maryland and Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of said Collection District and are by reason of such offices respectively charged with the performance of certain duties prescribed by law. As to the nature and extent of the duties so prescribed defendants respectfully invite the Court's attention to the statutes governing the same. Further answering said paragraph defendants aver that the taxing provisions of the Bituminous Coal Conservation Act of 1935 have not as yet become effective and that no tax whatever has been levied, assessed or imposed against the defendant Carter Coal Company under the provisions of said Act, and further that no such tax whatever will in any event become subject to collection from said Carter Coal Company prior to the first day of the second succeeding month after the formulation by the National Bituminous Coal Commission of the code contemplated by said Act.

24. Answering paragraph twenty-four of said bill defendants admit that defendant Homer S. Cummings is Attorney General of the United States, that defendant Stanley Reed is Solicitor General and in the absence of the Attorney General is the Acting Attorney General of the United States, that defendant Leslie C. Garnett is United States Attorney [fol. 35] in and for the District of Columbia, and that said defendants are by reason of such offices respectively charged with the performance of certain duties prescribed by law. As to the nature and extent of the duties so prescribed defendants respectfully invite the Court's attention to the statutes governing the same, and particularly to the provisions of the Bituminous Coal Conservation Act of 1935 relative to the method of its enforcement, namely by means

of judicially reviewable administrative orders. Said defendants disavow any intention of taking any action or instituting any proceeding against the defendant Carter Coal Company except such actions or proceedings as are authorized by law. As to all such actions or proceedings the legal remedy of the defendant Carter Coal Company is adequate.

25. Answering paragraph twenty-five of said bill defendants admit that defendant John B. Colpoys is United States Marshal in and for the District of Columbia and as such officer is charged with the performance of certain duties prescribed by law. As to the nature and extent of such duties defendants respectfully invite the Court's attention to the rules and statutes governing the same. Further answering said paragraph defendants aver that no distraint warrant against the property of defendant Carter Coal Company has ever been issued or threatened to be issued by defendants M. Hampton Magruder and Clarence C. Keiser or either of them or by anyone acting in their place or stead in connection with any tax imposed under the provisions of the Bituminous Coal Conservation Act of 1935.

26. Answering paragraph twenty-six of said bill these defendants deny that the acceptance by the said Carter Coal [fol. 36] Company of the code provided for by the Bituminous Coal Conservation Act of 1935 would be illegal, unconstitutional or ultra vires and also deny upon information and belief that the result of compliance with such code will be a substantial loss or diversion of the business of said Company. Defendants are without knowledge of what the minimum or maximum prices will be if and when such minimum and maximum are established pursuant to said code, and are also without knowledge concerning said Carter Coal Company's existing contracts with its customers and are consequently without knowledge concerning the effect, if any, of such minimum and maximum prices upon such existing contracts. Defendants deny that the said Carter Coal Company by assenting to said code or by becoming a member thereof will be acting in violation of the Antitrust Laws of the United States or of the State of Virginia or of other States. Although plaintiff has failed to disclose in his bill the manner or extent to which he claims the said Carter Coal Company will be subject to pecuniary losses by reason of its assenting to said code, these defendants deny that said Company or its shareholders will suffer any pecuniary

loss or injury by reason of such acceptance, but on the contrary allege on information and belief that acceptance of said code will result in a pecuniary advantage to said Company. The remaining allegations contained in paragraph twenty-six of the bill being conclusions of law, the defendants are not required to answer.

27. Answering the allegations contained in paragraph twenty-seven of said bill defendants show that plaintiff has [fol. 37] disclosed in his bill no good or sufficient equitable ground or reason for the issuance by this Court of an injunction restraining said Carter Coal Company from assenting to or becoming a member of said code and deny that the said Carter Coal Company is without an adequate remedy at law to protect its rights and property as the same may be affected by such tax or taxes as may hereafter be imposed under the provisions of said Bituminous Coal Conservation Act of 1935. Defendants are without knowledge of the amount of the production of the Carter Coal Company in the year 1934 or in previons years or of price or the profit realized by said Company upon the sale of the coal produced by it during said periods. Defendants are also without knowledge of the effect the payment of said 15% tax would have upon the business of the Carter Coal Company should said Company elect to pay the same rather than to subject itself to the regulatory provisions of said contemplated code.

28. These defendants deny each and every allegation contained in the said bill not hereinabove admitted, explained or denied.

II.

Further answering the bill of complaint and as a separate defense thereto, these defendants say:

Bituminous coal is consumed in every State of the United States in generating energy for the production of light, heat and power. It furnishes approximately 45 percent of the total energy consumed for such purposes in the United States. Its use for the aforesaid purposes is indispensable to the industrial and economic life and to the health and comfort of the inhabitants of every State and is vital to the national public welfare.

Commercially important deposits of bituminous coal [fol. 38] within the United States are limited to 23 produc-

ing areas confined within the boundaries of 26 States and more than 70 percent of the total annual output is mined in four States. Approximately 85 percent of the bituminous coal produced within the United States is consumed (a) in States other than the State in which it was mined, or (b) by railroads engaged in interstate commerce. Over 20 percent of the total annual production of bituminous coal is required for the use of such interstate railroads as fuel. The distribution of bituminous coal from the producing areas to the consuming public throughout the nation supplies over 17 percent of the total gross freight revenues of the railroads engaged in interstate commerce.

In view of the great present importance of bituminous coal as a source of energy for industrial and domestic purposes, and in view of the necessity of transporting it across State lines to reach the great majority of the users, it is of particular importance to the national public welfare that the distribution and marketing of bituminous coal in interstate commerce be not subjected to interruptions, dislocations, burdens, or restraints. For many years the distribution and marketing of bituminous coal in interstate commerce has been subject (a) to sudden unforeseeable, recurrent and prolonged interruptions and stoppages in the shipment of such coal from the producing areas to the consuming markets; (b) to sudden, recurrent and extremely wide fluctuations in the price of such coal to the consuming public, resulting in hardship and inconvenience to the consuming public in other States than the State of production, and tending directly and substantially to restrict and control the movement of coal in interstate commerce; [fol. 39] (c) to unfair and demoralized methods of competition throughout the industry which operate directly and substantially to burden and restrain interstate commerce in bituminous coal. Such burdens, restraints and interruptions have operated so as to affect seriously and injuriously a multitude of consumers of bituminous coal throughout the country, to cause a substantial waste of the coal resources of the nation, to bring about the bankruptcy of many coal producers and to result in widespread unemployment. Such conditions have resulted in serious and widespread reigns of disorder and violence requiring resort on the part of public authorities and of the private parties directly concerned therewith to the State and Fed-

eral courts of law and equity and necessitating the use of State militia and of Federal troops.

For the purpose of determining the cause or causes of the burdens, restraints and interruptions aforesaid and of providing appropriate legislative measures to remove or control the same, various Congresses of the United States have, since the year 1918, made or caused to be made, among others, the following fact-finding investigations into the conditions under which bituminous coal is produced, distributed and marketed throughout the United States, viz.

Hearings before the Committee on Manufactures of the Senate on Shortage of Coal (65th Cong., 2nd Sess., 1918);

Hearings before the Committee on Interstate Commerce of the Senate on Increased Price of Coal (66th Cong., 1st Sess., 1919, 1920, 1921);

Hearings before the Committee on Reconstruction and Production of the Senate on Coal and Transportation (66th Cong., 3rd Sess., 1920, 1921);

Hearings before the Committee on Education and Labor of the Senate on Conditions in the West Virginia Coal Fields (67th Cong., 1st Sess., 1921, 1922);

[fol. 40] Hearings before the Committee on Labor of the House of Representatives on Labor Conditions in the Coal Industry (67th Cong., 2nd Sess., 1922);

Report of the United States Coal Commission pursuant to the Act of September 22, 1922, published in 1925;

Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on Coal Legislation (69th Cong., 1st Sess., 1926);

Hearings before the Committee on Interstate Commerce of the Senate on Conditions in the Coal Fields of Pennsylvania, West Virginia, and Ohio (70th Cong., 1st Sess., 1928);

Hearings before the Committee on Interstate Commerce of the Senate on Proposed Bituminous Coal Legislation (70th Cong., 2nd Sess., 1929);

Hearings before the Committee on Mines and Mining of the Senate on the Creation of a Bituminous Coal Commission (72nd Cong., 1st Sess., 1932);

Hearings before the Committee on Interstate Commerce of the Senate on Stabilization of the Bituminous Coal Mining Industry (74th Cong., 1st Sess., 1935);

Hearings before the Committee on Ways and Means of the House of Representatives on Stabilization of the Bituminous Coal Mining Industry (74th Cong., 1st Sess., 1935).

From the facts disclosed in and by the aforesaid legislative investigations, and otherwise, it was and is made evident, and these defendants aver the facts to be, that the aforesaid burdens and restraints upon and interruptions to such commerce in bituminous coal are presently, primarily and directly due to and caused and occasioned by the existence of an abnormal and destructive competitive rivalry for markets between the said several producing areas and between the producing units therein contained; that such unbridled competition has resulted in a reduction of the average mine realization price of bituminous coal to a level frequently below the average cost of production of such coal; that over 60 percent of the cost [fol. 41] of producing bituminous coal in the United States is attributable to the cost of labor going directly into its production and that such labor cost is the only cost element that is subject to appreciable adjustment; that as a direct result of such competition wages in said industry have been progressively forced down to a point below subsistence levels; that numerous controversies resulting in strikes and lockouts and in the interruption, cessation and dislocation of production and distribution have resulted directly from such price and wage reductions and from the refusal of employers to bargain collectively relative thereto and from various unfair labor practices; that to remove or control the aforesaid direct and substantial burdens upon and interruptions to interstate commerce in bituminous coal it is necessary that competition between the various producing areas aforesaid in the consuming markets of the several states be regulated by the elimination of unfair competitive marketing practices, by the fixing between fair and reasonable limits of the price at which such coal may be distributed in such consuming markets and by stabilizing and equalizing as between producing areas, and between the producing units therein contained, the wages and hours of labor of employees, and by otherwise eliminating the causes of strikes and lockouts.

The defendant Carter Coal Company is engaged in the business of producing bituminous coal for distribution and sale in interstate commerce and of distributing and selling bituminous coal in such commerce and in the conduct of such business is subject and amenable to federal regulation, to the extent and in the manner prescribed by the code provided for in Section 4 of the said Bituminous Coal Conservation Act of 1935.

[fol. 42] III

For a further, separate and distinct defense in point of law arising upon the face of the bill of complaint herein, defendants say that the facts alleged in said bill are insufficient to constitute a cause of action in equity because

1. The bill fails to disclose that the intended acceptance of the contemplated code by the Carter Coal Company will cause an irreparable or any injury to the said company or to plaintiff;

2. The Bituminous Coal Conservation Act of 1935 provides that acceptance of the code by the Carter Coal Company will not prejudice the right of said company to contest the constitutionality or validity of any code provision. The provisions of the code are not self-executing, but depend for their enforcement upon orders of the National Bituminous Coal Commission. Should any order be made by said Commission which the Carter Coal Company deems detrimental or injurious to its interest the constitutionality and the validity of the same may in the light of the terms of such order and of the facts and circumstances then existing under the express provisions of the Act be speedily and adequately tested by the Carter Coal Company before one of the Circuit Courts of Appeals of the United States or the United States Court of Appeals for the District of Columbia. The mere acceptance of said code by said Carter Coal Company can therefore cause said company no irreparable or any injury, and it follows also that by the express provisions of said Act the said Carter Coal Company has an adequate judicial remedy for any future injury to which it may hereafter feel itself exposed. It also follows that the [fol. 43] bill as to these defendants is premature.

3. The bill as to the defendants Carter Coal Company and its directors is premature.

4. The bill discloses no real case or controversy between plaintiff and the defendant Carter Coal Company, its officers and directors.

5. The bill states no grounds for an injunction to restrain these defendants from the collection of the 1½% tax imposed by the Act, and, since the bill discloses that the defendant Carter Coal Company intends to become a member of the code when the same is formulated, and will therefore not be subject to the 15% tax provided for in the Act, it also states no grounds for an injunction to restrain the collection of such 15% tax.

6. Insofar as the bill seeks an injunction against these defendants it is premature in that no tax has been levied or assessed against the defendant Carter Coal Company.

7. Insofar as the bill seeks an injunction against the collection of any tax which may hereafter be assessed against the defendant Carter Coal Company under the provisions of Section 3 of the Bituminous Coal Conservation Act of 1935 it cannot be maintained because of the provisions of Section 3224 of the Revised Statutes of the United States (U. S. C. Title 26, § 154).

8. The defendant Carter Coal Company has an adequate remedy at law for all of the conjectural injuries referred to by plaintiff in said bill, and the said bill is premature in that the said defendant Carter Coal Company has not availed itself of the complete and adequate administrative and judicial remedies provided in said Bituminous Coal Conservation Act of 1935 for its protection.

9. Plaintiff is not entitled to a declaratory judgment as [fol. 44] prayed for in said bill of complaint because no actual controversy is herein involved and this Court has jurisdiction to render a declaratory judgment only in cases of actual controversy.

10. Plaintiff is not entitled to a declaratory judgment as prayed for in said bill of complaint because by an amendment to the Federal Declaratory Judgments Act enacted by the Congress on August 30, 1935, it is provided that the federal courts have no jurisdiction to render declaratory judgments with respect to federal taxes (Public No. 407, 74th Congress, Sec. 405).

Wherefore, having thus made answer to all the matters and things contained in plaintiff's bill of complaint, these defendants pray that plaintiff take nothing by reason thereof and that they be hence dismissed with their costs.

John Dickinson, Assistant Attorney General of the United States; Leslie C. Garnett, United States Attorney in and for the District of Columbia, Attorneys for the Aforesaid Defendants. Carl McFarland, F. B. Critchlow, Special Assistants to the Attorney General, David A. Pine, John J. Wilson, Assistant United States Attorneys.

Duly sworn to by F. B. Critchlow. Jurat omitted in printing.

[fol. 45] Received copy of the foregoing answer this 2nd day of October, 1935.

Frederick H. Wood, Richard H. Wilmer, Attorneys for Plaintiff.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ANSWER OF DEFENDANTS, CARTER COAL COMPANY, GEORGE L. CARTER, C. A. HALL, JOHN CALLAHAN, JOSEPH W. GORMAN, AND WALTER C. DENHAM, TO BILL OF COMPLAINT—Filed October 4, 1935.

Now come the defendants, Carter Coal Company, George L. Carter as Vice-President and Director of said Company, C. A. Hall as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter S. Denham as Vice-Presidents of said Company, and for answer to the Bill of Complaint filed herein on the 31st day [fol. 46] of August, 1935, jointly show to the Court as follows:

1. The defendants admit the allegations of paragraph 1 of the Bill of Complaint.

2. The defendants admit the allegations of paragraph 2 of the Bill of Complaint.

3. The defendants admit the allegations of paragraph 3 of the Bill of Complaint.

4. The defendants admit the allegations of paragraph 4 of the Bill of Complaint.

5. The defendants admit the allegations of paragraph 5 of the Bill of Complaint, except that they allege that the true and correct name of defendant Walter C. Denham is Walter S. Denham.

6. The defendants admit the allegations of paragraph 6 of the Bill of Complaint.

7. The defendants admit the allegations of paragraph 7 of the Bill of Complaint.

8. The defendants admit the allegations of paragraph 8 of the Bill of Complaint.

9. The defendants admit the allegations of paragraph 9 of the Bill of Complaint.

10. The defendants admit the allegations of paragraph 10 of the Bill of Complaint.

11. The defendants admit the allegations of paragraph 11 of the Bill of Complaint.

12. The defendants admit the allegations of paragraph 12 of the Bill of Complaint.

13. The defendants admit the allegations of paragraph 13 of the Bill of Complaint.

[fol. 47] 14. The defendants admit the allegations of paragraph 14 of the Bill of Complaint.

15. The defendants admit the allegations of paragraph 15 of the Bill of Complaint.

16. The defendants admit the allegations of paragraph 16 of the Bill of Complaint.

17. The defendants are advised that the allegations of paragraph 17 are conclusions of law and with respect to such allegations they are not required to make answer.

18. The defendants admit the allegations of paragraph 18 of the Bill of Complaint.

19. The defendants admit the allegations of paragraph 19 of the Bill of Complaint.

20. The defendants admit the allegations of paragraph 20 of the Bill of Complaint.

21. The defendants admit the allegations of paragraph 21 of the Bill of Complaint.

22. The defendants admit the allegations of paragraph 22 of the Bill of Complaint.

23. The defendants admit the allegations of paragraph 23 of the Bill of Complaint.

24. The defendants admit the allegations of paragraph 24 of the Bill of Complaint.

25. The defendants admit the allegations of paragraph 25 of the Bill of Complaint.

26. The defendants admit the allegations of fact contained in paragraph 26 of the Bill of Complaint, but are advised that certain of the allegations contained in said paragraph are conclusions of the pleader as to which they are not required to make answer.

[fol. 48] 27. The defendants admit the allegations of paragraph 27 of the Bill of Complaint.

And for further answer to the Bill of Complaint said defendants allege:

(a) That they intend to accept and bind the Carter Coal Company to comply with the provisions of the Bituminous Coal Code provided for in the Bituminous Coal Conservation Act of 1935, for the reason that the penalty for failure to accept the said code, in the form of a fifteen per cent tax upon all sales of bituminous coal by said defendant company, would result in irreparable and serious damage to the Company and might result in its bankruptcy.

(b) That the enactment of the Bituminous Coal Conservation Act and the actions authorized thereunder and directed thereby have embarrassed these defendants in the operation of the business of said Company, and that the business of said Company can not be carried on normally until the questions of the validity of the said statute and the said Code raised by the Bill of Complaint herein are authoritatively determined by this Honorable Court.

Wherefore, the defendants, having answered the Bill of Complaint filed herein, pray that if the Court should grant

an injunction restraining these defendants from assenting to or filing an acceptance of the said Code binding the defendant Carter Coal Company to observe the same, then in that event the Court issue its writ of injunction enjoining the collection of the fifteen per cent tax provided for by the Bituminous Coal Conservation Act of 1935; and the defendants further pray that this cause be set down for im- [fols. 49 and 50] mediate hearing on the merits in order to remove the obstruction to the conduct of the business of the defendant Carter Coal Company caused by the uncertainties of the existing situation, as aforesaid.

Carter Coal Company, by C. A. Hall, Secretary-Treasurer; Geo. L. Carter, Vice-President and a Director of Carter Coal Company; C. A. Hall, Secretary-Treasurer and a Director of Carter Coal Company; John Callahan, Vice-President of Carter Coal Company, by C. A. Hall, Agent; Joseph W. Gorman, Vice-President of Carter Coal Company, by C. A. Hall, Agent; Walter S. Denham, Vice-President of Carter Coal Company, by C. A. Hall, Agent. Karl J. Hardy, Transportation Building, Washington, D. C., Attorney for Defendants, Carter Coal Company; George L. Carter, Vice-President and a Director of said Company; C. A. Hall, Secretary-Treasurer and a Director of said Company; John Callahan, Vice-President of said Company; Joseph W. Gorman, Vice-President of said Company, and Walter S. Denham, Vice-President of said Company.

Duly sworn to by C. A. Hall et al. Jurats omitted in printing.

[fol. 51] IN SUPREME COURT OF DISTRICT OF COLUMBIA

REPLY OF PLAINTIFF TO SEPARATE DEFENSE AS SET FORTH IN PART II OF ANSWER OF DEFENDANTS, GUY T. HELVERING, INDIVIDUALLY AND AS COMMISSIONER OF INTERNAL REVENUE OF THE UNITED STATES ET AL.—Filed October 5, 1935.

For its reply to the separate defense of the defendants Guy T. Helvering, individually and as Commissioner of

Internal Revenue of the United States, M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for [fol. 52] Division No. 2 of the Collection District of Maryland, John B. Colpoys, individually and as United States Marshal in and for the District of Columbia, Homer S. Cummings, individually and as Attorney General of the United States, Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States, and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, which separate defense is contained in Part II of the answer of said defendants, the plaintiff, denying the relevance or materality to this case of any of the allegations contained in said separate defense, admits the following allegations:

1. That bituminous coal is consumed in every State of the United States in generating energy for the production of light, heat and power;

2. That it furnishes approximately 45% of the total energy consumed for such purposes in the United States;

3. That its use for the aforesaid purposes is indispensable to the industrial and economic life and to the health and comfort of the inhabitants of every State and of the District of Columbia;

4. That commercially important deposits of bituminous coal within the United States are limited to 23 producing areas confined within the boundaries of 26 States and that more than 70% of the total annual output is mined in four States;

5. That approximately 85% of the bituminous coal produced within the United States is consumed (a) in States other than the State in which it was mined, or (b) by railroads engaged in interstate commerce;

6. That over 20% of the total annual production of [fol. 53] bituminous coal is required for the use of such interstate railroads as fuel;

7. That the distribution of bituminous coal from the producing areas to the consuming public throughout the nation supplies over 17% of the total gross freight revenues of the railroads engaged in interstate commerce;

8. That bituminous coal has great present importance as a source of energy for industrial and domestic purposes, and that it is transported across State lines to reach the great majority of the users, and that in view of the foregoing it is important that the distribution and marketing of bituminous coal be not subjected to interruption dislocations, burdens or restraints;

9. That the hearings before the various Congressional Committees and the Commission alleged in the answer have been held;

10. That there has been competitive rivalry for markets between the several producing areas in the bituminous coal industry and between the producing units therein contained;

11. That over 60% of the cost of producing bituminous coal in the United States is attributable to the cost of labor going directly into its production.

The plaintiff denies each and every allegation contained [fol. 54] in the said separate defense not hereinabove admitted.

James Walter Carter.

Cravath, de Gersdorff, Swaine & Wood, 15 Broad Street, New York, N. Y.; Frederick H. Wood, 15 Broad Street, New York, N. Y.; William D. Whitney, 15 Broad Street, New York, N. Y.; Richard H. Wilmer, Transportation Building, Washington, D. C., Attorneys for Plaintiff.

Duly sworn to by James W. Carter. Jurat omitted in printing.

[fol. 55] IN SUPREME COURT OF DISTRICT OF COLUMBIA

NOTICE OF MOTION TO ADVANCE—Filed October 5, 1935

To: Karl J. Hardy, Esquire, Attorney for Defendants Carter Coal Company, George L. Carter, C. A. Hall, John Callahan, Joseph W. Gorman and Walter C. Denham; John Dickinson, Esquire, Assistant Attorney General, F. B. Critchlow, Esquire, Special Assistant to the Attorney General, David A. Pine, Esquire, Assistant United States Attorney, John J. Wilson, Esquire, Assistant United States Attorney, attorneys for the defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States, M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland, Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland, John B. Colpbys, individually and as United States Marshal in and for the District of Columbia, Homer S. Cummings, individually and as Attorney General of the United States, Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States, and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia:

Please take notice that at 10 o'clock A. M. on Wednesday, October 9, 1935, or as soon thereafter as counsel may be heard before the Motions Court, counsel for the plaintiff will move the Motions Court to hear the attached motion to advance and to specially set the case for hearing.

William D. Whitney, Richard H. Wilmer, Attorneys for the Plaintiff.

Receipt of the foregoing notice is hereby acknowledged this 5th day of October, 1935.

Karl J. Hardy, Attorney for Defendant Carter Coal Company, et al.; John Dickinson, F. B. Critchlow, David A. Pine, John J. Wilson, Attorneys for Defendants Guy T. Helvering, et al.

[fol. 56] IN SUPREME COURT OF DISTRICT OF COLUMBIA

MOTION TO ADVANCE AND SPECIALLY SET CASE FOR HEARING—Filed October 5, 1935

Comes now the plaintiff, by his attorneys, and moves the Honorable Court to advance the above-entitled cause and set it down for hearing on Monday, October 14, 1935, or the earliest possible date thereafter, and, for reasons in support of his motion, assigns the following:

This case arises on a stockholder's bill and answers thereto raising the question of the constitutionality of the Bituminous Coal Conservation Act of 1935. The plaintiff, a stockholder in the Carter Coal Company, seeks to enjoin that company from carrying out its announced intention to become a member of the code provided for in said Act, and also seeks to enjoin the collection of the 15% tax imposed by the statute upon the sale of coal by operators not becoming code members. The question presented is one of national importance. The right of the plaintiff to the relief prayed for in the bill requires an early determination, inasmuch as the tax referred to begins to accrue, under the provisions of Sections 3 and 20 of the statute, on November 1 next, unless the Coal Commission, which has recently been appointed, is unable to formulate the code by that time, in which event the tax begins to accrue upon the date of the formulation of said code.

William D. Whitney, Richard H. Wilmer, Attorneys for the Plaintiff.

[fol. 57] IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO ADVANCE AND SET CASE SPECIALLY FOR HEARING—Filed October 5, 1935

As appears from the bill of complaint and the grounds of the motion filed herein to advance and to set the case for hearing on a day certain, the instant case presents issues of a character the early and immediate determination of which is indispensable.

The granting of the motion is within the sound discretion of the Court.

The Court's attention is respectfully invited to Law Rule 75 of this Honorable Court wherein it is provided that one of the justices shall be designated by the Court in general term from time to time to act as the assignment justice. By Law Rule 32 of this Honorable Court that justice who has been designated the motions justice shall dispose of all motions. It, therefore, follows that this motion to advance is rightfully before the Motions Court for determination and the grounds of the motion, it is respectully submitted, commend themselves as sound bases for the Court to exercise its discretion in the advancing of the case for hearing on October 14, 1935, or the earliest possible date thereafter.

Respectfully submitted, William D. Whitney, Richard H. Wilmer, Attorneys for the Plaintiff.

Receipt of a copy of the within motion to advance and specially set case for hearing and points and authorities [fol. 58] in support thereof is hereby acknowledged this 5th day of October, 1935.

Karl J. Hardy, Attorney for Carter Coal Company, et al.; John Dickinson, F. B. Critchlow, David A. Pine, John J. Wilson, Attorneys for Guy T. Helvering, et al.

In Supreme Court of District of Columbia

Memorandum of Points and Authorities on Behalf of Defendant Government Officers, Supporting Plaintiff's Motion to Advance but Opposing the Trial Date Requested by Plaintiff—Filed October 9, 1935

This cause involves the question of the constitutionality of the Bituminous Coal Conservation Act of 1935, a statute enacted by the 74th Congress for the purpose of stabilizing the bituminous coal mining industry and promoting its interstate commerce. Said industry is vital to the industrial and economic welfare of the nation and the determination of the question thus presented is of great importance to the members of said industry and to the country at large. The defendant Government Officers desire as speedy a determination of said question as may be possible considering the nature and importance of the issues involved and consequently join with plaintiff in requesting that an order

be made herein advancing the case for trial. Defendants are opposed, however, to the setting of the case for trial on October 14, the date requested by plaintiff, or on any date prior to the 25th day of November for the reasons hereafter stated.

[fol. 59] In the view of these defendants the constitutionality of said Act depends upon the existence of the burdens, dislocations, restraints and interruptions to interstate commerce in bituminous coal specified in the separate defense set up in sub-division II of defendant's answer and upon the facts relative to the causes and effects thereof, as therein set forth, and also upon facts relative to the reasonableness under the due process clause of the Fifth Amendment of the regulatory provisions of the proposed coal code. All of these averments are denied by plaintiff and involve the determination of issues of fact which, due to the magnitude of the bituminous coal industry and the competitive conditions existing as between the various producing fields and the consuming markets, are very complex and require, in order that they may be properly presented in evidence, the examination of many witnesses from many different sections of the country, the inspection of many documents and the preparation of many exhibits.

The determination of such factual issues upon proper evidence is of primary importance in cases of this sort as is amply evidenced by the decisions of the Supreme Court of the United States in the following cases: Schechter Poultry Corporation v. United States (— Sup. Ct. —); Chastleton Corporation v. Sinclair (264 U. S. 543); Hammond v. Schappi Bus Line (275 U. S. 164); Bordens Company v. Baldwin (293 U. S. 194). In the case last cited the Court said (p. 210):

"With the notable expansion of the scope of governmental regulations, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with ap-

[fol. 60] propriate determinations upon evidence so that conclusions shall not be reached without adequate factual support."

"Respondents' counsel, referring to the difficulties of price regulation, say that 'apparently the fixing of prices

by government discovered as many troubles as were loosed from Pandora's box.' This complexity of problems, however, makes it the more imperative that the Court in discharging its duty, in sustaining governmental authority within its sphere and in enforcing individual rights, shall not proceed upon false assumption."

The Act in question here was approved August 30, 1935. This suit was filed on August 31 and became at issue with the filing of plaintiff's reply on October 5. As above stated, the factual issues have to do with complex operations and interrelations of an immense nation-wide industry. The determination of these issues is of national concern and it is, of course, important that government counsel be given a full opportunity to adequately prepare the case and present the facts in evidence in a proper and orderly fashion.

The only basis for plaintiff's request that the trial of the case be set for as early as October 14 is the following statement contained in plaintiff's motion:

"The tax referred to begins to accrue, under the provisions of Sec. 3 and 20 of the statute, on November 1st, next, unless the coal commission which has been recently appointed, is unable to formulate the code by that time, in which event the tax begins to accrue upon the date of the formulation of the code."

In this connection defendants show that as appears from plaintiff's bill and also from his motion to advance the defendant, Carter Coal Company, intends to accept the code contemplated by the Act and that in such event said company will not be subject to the 15% tax of which plaintiff [fol. 61] complains.

This being the case, the necessity, from plaintiff's viewpoint, of a trial upon the merits before November 1st is made to depend entirely upon whether the acceptance of the code by the defendant company will result in any immediate or serious injury to said company's business. The only allegations contained in the bill which bear upon this question consist of the vague and general allegation in paragraph 26 that "plaintiff is informed and believes and apprehends and charges that the result of compliance by said

defendant with said provisions will be a substantial loss and diversion of the business of said Carter Coal Company," which general allegation is supported only by the particular averment that said company, by assenting to the code and complying with its price-fixing provisions, will subject itself to liability for damages for breach of its existing contracts with its customers. In connection with this particular averment attention is called to the fact that the provisions of the Act relative to the determination of minimum and maximum prices are such as to make it evident that a very considerable time must elapse after the formulation of the code before any such price determinations can be made. It is, therefore, apparent that even though the National Coal Commission should formulate the code on or prior to November 1st, and the Carter Coal Company accept the same, such acceptance could cause neither an immediate nor a serious injury to the business of the company. This is also apparent from the allegation contained in paragraph 27(b) of the Coal Company's answer to the [fol. 62] bill in which the effect of the Act upon the company's operations is described only in the following vague and uncertain language:

That the enactment of the Bituminous Coal Conservation Act and actions authorized thereunder and directed thereby have embarrassed these defendants in the operation of the business of said company, and that the business of said company cannot be carried on normally until the questions of the validity of the said statute and the said code raised by the bill of complaint herein are authoritatively determined by this Honorable Court.

Since the formulation of the code and the contemplated acceptance of the same by the defendant, Carter Coal Company, cannot immediately or seriously injure the business of said company, and since in no event can any tax imposed by the provisions of said Act become subject to collection before the 1st day of January, 1935, it is evident that even from plaintiff's standpoint there is no necessary or pressing reason for a trial of this cause prior to the 25th day of November, 1935. In view of the nature of the factual issues involved, it is also evident that defendants will require until said 25th day of November, 1935 to properly and ade-

quately prepare said case for presentation to this Honorable Court.

These defendants, therefore, respectfully submit that plaintiff's motion to advance this case be granted and that the Assignment Commissioner be directed to place the same upon the ready calendar upon the 25th day of November, 1935, for assignment at that time to the First Equity Division of this Court available thereafter.

Respectfully submitted,

John Dickinson, Assistant Attorney General. Leslie C. Garnett, United States Attorney for the District of Columbia. Attorneys for said Defendants.

[fol. 63] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER ADVANCING CASE AND SETTING SPECIALLY THE DATE FOR HEARING—Filed October 9, 1935

Upon consideration of the motion of the plaintiff to advance and specially set the above-entitled case for hearing filed herein on the 5th day of October, 1935, it is by the Court this 9th day of October, 1935,

Adjudged, ordered and decreed that said motion be, and it hereby is, granted and that the case be, and it hereby is, set specially for hearing on 28th, October, 1935.

Alfred A. Wheat, Chief Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

AFFIDAVIT OF JAMES WALTER CARTER IN SUPPORT OF PRELIMINARY INJUNCTION—Filed October 24, 1935

DISTRICT OF COLUMBIA, ss.

James Walter Carter, being first duly sworn, upon oath deposes and says:

1. Your affiant has had experience in the production of coal extending over many years, he having first taken an active part in the coal business in 1915, and having followed the business closely since that time and been engaged during much of that time in the management end of that busi-

ness. Your affiant is now the President and a director of, [fol. 64] and owner of a minority of the stock in, the defendant Carter Coal Company.

2. All the statements of fact set forth in the bill of complaint in the above-entitled cause are hereby incorporated by reference into this affidavit, with the same force and effect as if herein set out in full.

3. On the 20th day of September, 1935, the President of the United States appointed George E. Acret, Charles S. Hosford, Jr., Walter H. Maloney, C. E. Smith, and Percy Tetlow as the five members to compose the National Bituminous Coal Commission provided for by Sec. 2(a) of the Bituminous Coal Conservation Act of 1935. The said Walter H. Maloney duly took oath of office as a member of said Commission on Saturday, September 28, 1935, and the said George E. Acret, Charles S. Hosford, Jr., C. E. Smith and Percy Tetlow duly took oath of office as such members on Thursday, September 26, 1935, and the said Commission held its first meeting on Saturday, September 28, 1935.

4. On October 9, 1935, this cause was advanced by Mr. Chief Justice Wheat of this Court and assigned for trial on Monday, October 28 next, and later on the same day the National Bituminous Coal Commission aforesaid formulated the Bituminous Coal Code and forms for acceptance thereof.

5. On the same day, October 9, 1935, the said National Bituminous Coal Commission issued an order providing for the organization of district boards of coal producers as provided for in the said statute and the said Code, which order appointed Acting Deputy District Secretaries for each of the districts provided for in said statute and in said Code. Said Acting Deputy District Secretaries are authorized by said order to call meetings for the purpose [fol. 65] of organizing district boards.

6. On October 17, 1935, P. M. Snyder, the Acting Deputy District Secretary of the National Bituminous Coal Commission appointed by the order aforesaid, issued and delivered to the defendant Carter Coal Company a notice calling a meeting of all producers of bituminous coal in District No. 7 as defined by the statute and Code aforesaid for the purpose of organizing a district board for said

district, such meeting to be held on October 30, 1935, at 10 o'clock a. m. at Black Knight Country Club, Beckley, West Virginia. The said notice, and the papers delivered to Carter Coal Company annexed thereto (including a copy of the Bituminous Coal Code and forms for the acceptance thereof), is attached hereto as Exhibit A to this affidavit and incorporated herein by reference with the same force and effect as if herein set out in full.

7. Your affiant is informed and believes and alleges that the penalty imposed by Section 3 of the Bituminous Coal Conservation Act of 1935 in the form of a tax of 15% upon all sales of bituminous coal by producers who do not assent to and become members of the Code aforesaid will begin to accrue against all such producers on November 1, 1935, pursuant to the provisions of Sections 3 and 20 of the Bituminous Coal Conservation Act aforesaid.

8. Should the defendant Carter Coal Company assent to and become a member of the said Code, as it has stated that it intends to do and has threatened to do (in order to escape the destructive effect of the accrual of the penalty taxes aforesaid), then immediate, substantial and irreparable injury and loss will occur to the said Company and to the rights of the affiant, in the following, among other, [fol. 66] respects:

9. The said Code requires that:

"All code members shall, in their respective districts, report all spot orders to the district board and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the district board as the confidental records of the code member filing such information."

Both the Bituminous Coal Conservation Act and the Code require that the district board shall (except for one labor member) be composed of producers of coal, and consequently shall be principally composed of the competitors of the Carter Coal Company. Should the Carter Coal Company become a member of the Code, it would obligate itself

immediately to supply to a board principally composed of its competitors all of the most confidential records of its business, thereby depriving it of its constitutional rights should the Bituminous Coal Conservation Act be declared invalid, and subjecting it to grave, immediate and irreparable injury.

10. The said Code requires the district boards and the Commission to fix minimum prices for the sale of coal to be binding on all Code members. Your affiant believes and apprehends and alleges that the said district boards and the said Commission will proceed promptly to perform their statutory duty of fixing such minimum prices.

11. As a result of his study of the aforesaid Code in the light of his long experience in the coal business, and his knowledge of the business conditions therein, your affiant believes and avers and alleges that the minimum prices so fixed pursuant to the said Code will inevitably be higher than the prices at which coal is now sold by the defendant [fol. 67] Carter Coal Company to its customers, as a result of which the Carter Coal Company will be unable to retain its present volume of sales and its business will be substantially and irreparably ruined.

12. Section 8 of the said Code requires that Code members shall refuse to sell or deliver any coal (with certain exceptions) at a price below the minimum or above the maximum therefor approved and established by the Commission, thereby requiring them to breach some or all of their existing contracts. Your affiant believes and charges that whatever prices may be fixed pursuant to the Bituminous Coal Code will inevitably differ from those now fixed in some at least of the existing contracts upon which the Carter Coal Company is committed to deliver coal in the future, so that the Carter Coal Company, by joining the Code, will undertake to breach at least some of its existing contracts. Your affiant is advised and believes and alleges that the Bituminous Coal Conservation Act of 1935 and the Code promulgated thereunder are unconstitutional and, therefore, would afford no protection to the Company for the breach of such contracts, and that such breach would render the Company liable to the payment of damages, whereby it will inevitably incur financial loss.

13. Your affiant is informed and believes that by joining the said Code the Carter Coal Company would surrender to its competitors the right not only to fix the minimum and maximum prices at which the coal of the Carter Coal Company may be sold (subject only to appeal to the Bituminous Coal Commission, and thence to the courts on questions of [fol. 68] law), but the right to determine the hours of labor of the employees of the Carter Coal Company and the wages to be paid them by the Company. Your affiant knows of his own knowledge and alleges that labor costs and prices are two of the important elements requiring business skill and judgment in the successful operation and management of a coal producing and selling corporation.

14. Your affiant is advised and believes and, therefore, apprehends and charges, that the Bituminous Coal Code will constitute, as between those assenting to and becoming bound thereby, an agreement between competitors for the maintenance of prices and that as such the mere joining of said Code, whether or not any prices are ever fixed thereunder will constitute a violation of the anti-trust laws of the United States or of the several States; and that, therefore, the mere act of assenting to the said Code, without more, will render the said Company and its officers and directors (including your affiant who is an officer and director of said Company) liable to heavy criminal and pecuniary damages for violation of said laws; and that since the Bituminous Coal Conservation Act and the Code are both unconstitutional they would afford the Company and your affiant no protection whatever against such immediate irreparable and serious jeopardy and loss.

15. Your affiant alleges that by joining the said Code, Carter Coal Company will undertake a liability for its proportionate share of the expense of administering the Bituminous Coal Conservation Act. Your affiant is familiar with the proportionate share of the expense borne by the [fol. 69] Carter Coal Company for the administration of the Bituminous Coal Code under the National Industrial Recovery Act which was in de facto operation in 1933 and 1934, and is further informed and believes that the Bituminous Coal Code imposed under the Bituminous Coal Conservation Act follows closely the so-called Code of Fair Competition for the Bituminous Coal Industry imposed

under the supposed authority of said National Industrial Recovery Act. Your affiant believes and apprehends and therefore alleges that the proportionate share of the Carter Coal Company of the expense of administering the Code under the Bituminous Coal Conservation Act of 1935 will likewise be substantial, and your affiant is unwilling to have his interest in the said Company burdened and damaged by the heavy expense of administering this unworkable and unconstitutional statute.

16. Your affiant further apprehends, as a result of his own experience in the coal business and as a result of his experience during the period of the operation of a similar scheme of governmental regulation in the bituminous industry under the supposed authority of the National Industrial Recovery Act, that the effect of surrender of the abovementioned most vital functions in the successful management of a coal company to the domination, control and absolute regulation of federal commissions, acting in reliance upon and in collaboration with boards or associations of competitors, will imperil the business of the Carter Coal Company by empowering its competitors to take an active [fol. 70] part in regulating its prices, wages and markets. Your affiant has a large financial interest in the assets and business, good will and going concern value of the Carter Coal Company, and he is unwilling, unless required by law, to entrust the maintenance of that business and of that good will and value to the management of competitors of the Carter Coal Company, or of Government commissions or boards, as to whose competence and intentions he has no knowledge. Your affiant is advised by counsel, and believes, that such surrender of the control of the business of the Carter Coal Company is also ultra vires the corporation and its officers and directors, and is illegal.

17. Your affiant further apprehends that the fact that the statute gives "full authority" to the district boards (to be composed, as above mentioned, principally of competitors of your affiant) to classify coals and price variations as to individual mines may be used as the basis of prejudicial and highly damaging discrimination against individual producers (including the defendant Carter Coal Company) against which the elaborate machinery for appeal to a government commission and then to a circuit court of appeals can never in practice provide timely and adequate relief.

18. Your affiant received this morning (October 23) Bulletin No. 1396 of the National Coal Association containing inter alia the following:

"National Bituminous Coal Commission News

* * * * * * *

"Officials of the Internal Revenue Bureau disclosed to press representatives in Washington this week that the Bureau is rapidly making its arrangements for the collec- [fol. 71] tion of the tax on the sale price of bituminous coal levied under the Bituminous Coal Conservation Act of 1935. Deputy Commissioner Bliss said their forms and regulations were well advanced but that he could not say just now when they would be made public."

James Walter Carter.

Subscribed and sworn to before me this 24th day of October, 1935. Kenneth C. Robertson, Notary Public, D. C. [Notarial Seal.]

[fol. 72] EXHIBIT "A" TO AFFIDAVIT

United States

Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

Notice to Bituminous Coal Producers of District Board Organization Meeting

Notice is hereby given to all producers of bituminous coal in District No. 7, as defined by Act of Congress, entitled "Bituminous Coal Conservation Act of 1935," that:

A meeting will be held at 10:00 o'clock A. M., on the 30th day of October, 1935, at Black Knight Country Club, Beckley, West Virginia, for the above named District No. 7, as defined by the said Act, of all qualified producers of bituminous coal, for the purpose of determining the number of members of a district board and for the election of its members, as the same is provided for in the said Act, and to consider and pass upon such other matters as may lawfully come before said meeting under the provisions of said Act.

Only qualified producers, as defined in General Order No. 3 of the National Bituminous Coal Commission, shall be entitled to participate in the said meeting and vote therein. Copies of General Orders No. 1, 2, and 3, and of Forms 1, 4, and 5, of said Commission may be procured from the undersigned Deputy at the address below stated.

All qualified producers voting by proxy must comply with said General Order No. 3.

Dated this 17th day of October, 1935.

P. M. Snyder, Acting Deputy District Secretary of the National Bituminous Coal Commission. Address: Mount Hope, West Virginia.

Instructions to Acting Deputy District Secretaries

(Not to be included in notice published in the newspaper)

A copy of the above notice and of General Orders No. 1, 2, and 3, and the following Forms of the Commission: in duplicate, Form 4, and in triplicate, Forms 1 and 5, shall be mailed to all known producers in the district in accordance with the provisions of said General Order No. 3.

[fol. 73] United States Department of the Interior

National Bituminous Coal Commission, Washington, D. C.

General Order No. 1

An Order Promulgating the Bituminous Coal Code

Pursuant to Act of Congress, entitled "Bituminous Coal Conservation Act of 1935," the National Bituminous Coal Commission, by said Act duly created, in regular meeting duly assembled on this 9th day of October, 1935, for the purpose of carrying out the declared policy of said Act, hereby formulates and prescribes a working agreement, effective as provided in said Act, to be known as the "Bituminous Coal Code," as follows, to wit:

Bituminous Coal Code

The Act of Congress, entitled "Bituminous Coal Conservation Act of 1935," is hereinafter referred to as the "Act." The National Bituminous Coal Commission, created by said Act, is hereinafter referred to as the "Com-

mission." This Bituminous Coal Code is hereinafter referred to as the "Code." A "Code Member," as hereinafter referred to, is a producer accepting the Code in the manner provided by the Commission, whose membership shall not have been terminated. The Bituminous Coal Labor Board, created by said Act, is hereinafter referred to as the "Labor Board." The term "bituminous coal" as used in this Code shall include all bituminous, semibituminous, and subbituminous coal and lignite. The term "producer" shall include all persons, firms, associations, corporations, trustees, and receivers engaged in mining bituminous coal.

Part I—Organization and Production

Sec. 1. Twenty-three district boards of coal producers shall be organized. Each district board shall consist of not less than three nor more than seventeen members. The number of members of the district board shall, subject to the approval of the Commission, be determined by the majority vote of the district tonnage during the calendar year 1934 represented at a meeting of the producers of the district called for the purpose of such determination and for the election of such district board; and all known producers within the district shall be given notice of the time and place of the meeting. All but one of the members of the district board shall be producers or representatives of producers truly representative of all the mines of the district. The number of such producer members shall be an even number. One-half of such producer members shall be elected by the majority in number of the producers of the district represented at the aforesaid meeting. The other producer members shall be elected by votes cast in the proportion of the annual tonnage output for the preceding calendar year of the producers in the district, with the right on the part of the producers to vote their tonnage cumulatively: Provided, That not more than one officer or employee of any producer within a district shall be a member of the district board at the same time. The remaining member of each district board shall be selected by the organization of employees representing the preponderant number of employees in the industry of the district in ques-

tion. The term of district board members shall be two years and until their successors are elected.

In case any marketing agency comprising a substantial number of code members in any producing field within a district establishes, to the satisfaction of the Commission, that it has no representation upon the district board and that it is fairly entitled thereto, the Commission may, in its discretion, after hearing, increase the membership of such district board so as to provide for such representation.

Marketing agencies may be established or maintained within any district by a voluntary association of producers within any producing field therein, as such producing field may be defined by the district board, and function under [fol. 74] such general rules and regulations as may be prescribed by the district board, with the approval of the Commission, for the purpose of marketing their coal with due respect for the standards of unfair competition as defined in said Act. Each such marketing agency shall impose no unreasonable or inequitable conditions of membership and shall be truly representative of at least one-third of the tonnage of any producing field or group of producing fields.

The term "marketing agency" or "agencies" as used in said Act shall include any trade association of coal producers complying with the requirements of a marketing agency and exercising the functions thereof.

The district boards and marketing agencies shall each have power to adopt bylaws and rules of procedure, subject to approval of the Commission, and to appoint officers from their own membership, to fix their terms and compensation, to provide for reports, and to employ such committees, employees, arbitrators, and other persons necessary to effectuate their purposes. Members of the district board shall serve, as such, without compensation, but may be reimbursed for their reasonable expenses. The territorial boundaries or limits of such twenty-three districts are set forth in the schedule entitled "Schedule of Districts" and annexed to this code: Provided, That the territorial boundaries or limits of any district or districts may be changed, or said districts may be divided or consolidated, after hearing, by the Commission.

Sec. 2. The expense of administering this code by the respective district boards shall be borne by those subject to the jurisdiction of such boards, respectively, each paying his proportionate share, as assessed, computed on a tonnage basis, in accordance with regulations prescribed by such boards with the approval of the Commission. Such assessments may be collected by the district board by action in any court of competent jurisdiction.

Sec. 3. Nothing contained in said Act shall constitute the members of a district board partners for any purpose. Nor shall any member of a district board be liable in any manner to any one for any act of any other member, officer agent or employee of the district board. Nor shall any member of a district board, exercising reasonable diligence in the conduct of his duties under said Act, be liable to any one for any action or omission to act under said Act, except for his own willful misfeasance, or for nonfeasance involving moral turpitude.

Part II—Marketing

Sec. 4. All code members shall, in their respective districts, report all spot orders to the district board and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the district board as the confidential records of the code member filing such information.

Each district board may set up and maintain a statistical bureau, and the district board may require that such reports and other information in this section described shall be filed with such statistical bureau in lieu of the filing thereof with the district board.

Each district board shall, from time to time on its own motion or when directed by the Commission, establish minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, with full authority, in establishing such minimum prices, to make such classification of coals and price variations as to mines and consuming market areas as it

may deem necessary and proper. In order to sustain the stabilization of wages, working conditions, and maximum hours of labor, said prices shall be established so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated "Minimum-price area table," equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation, and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operator's association dues, district board assessments for Board operating expenses only levied under this code, and reasonable costs of selling and the cost of administration.

Minimum-Price-Area Table

Area 1: Eastern Pennsylvania, district 1; western Pennsylvania, district 2; northern West Virginia, district 3; Ohio, district 4; Michigan, district 5; Panhandle, district 6; Southern numbered 1, district 7; Southern numbered 2, district 8; West Kentucky, district 9; Illinois, district 10; Indiana, district 11; Iowa, district 12; that part of Southeastern, district 13, comprising Van Buren, Warren, and McMinn Counties in Tennessee.

[fol. 75] Area 2: Southeastern, district 13, except Van Buren, Warren, and McMinn Counties in Tennessee.

Area 3: Arkansas-Oklahoma, district 14.

Area 4: Southwestern, district 15.

Area 5: Northern Colorado, district 16; southern Colorado, district 17; New Mexico, district 18.

Area 6: Wyoming, district 19; Utah, district 20.

Area 7: North Dakota and South Dakota, district 21.

Area 8: Montana, district 22.

Area 9: Washington, district 23.

The minimum prices so established shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due

regard to the interests of the consuming public. The procedure for establishment of minimum prices shall be in accordance with rules and regulations to be approved by the Commission.

A schedule of such minimum prices, together with the data upon which they are computed, including, but without limitation, the factors considered in determining the price relationship, shall be submitted by the district board to the Commission, which may approve, disapprove, or modify the same to conform to the requirements of this section, and such approval, disapproval, or modification shall be binding upon all code members within the district, subject to such modification therein as may result from the coordination provided for in the succeeding section 5: Provided, That all minimum prices established for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable as between producers within the district: And provided further, That no minimum price shall be established that permits dumping.

As soon as possible after its creation, each district board shall determine the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1934. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January 1, 1934. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1934, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis for the establishment of minimum prices to be effective until changed by the Commission. Thereafter, upon satisfactory proof made at any time by any district board of a change in excess of 2 cents per net ton of two thousand pounds in the weighted average of the total costs in the minimum-price area, exclusive of seasonal changes, the

Commission shall increase or decrease the minimum prices accordingly. The weighted average figures of total cost determined as aforesaid shall be available to the public.

Each district board shall, on its own motion or when directed by the Commission, establish reasonable rules and regulations incidental to the sale and distribution of coal by code members within the district. Such rules and regulations shall not be inconsistent with the requirements of this code and shall conform to the standards of fair competition hereinafter established. Such rules and regulations shall be submitted by the district board to the Commission with a statement of the reasons therefor, and the Commission may approve, disapprove, or modify the same, and such approval, disapproval, or modification shall be binding upon all code members within the district.

Sec. 5. District boards shall, under rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the rules and regulations established by them, respectively, under section 4 hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities, and sizes of coal, and transportation charges upon coal. All minimum prices established for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, and shall reflect, as nearly as possible, the relative market values, at points of delivery in each common consuming market area, of the various kinds, qualities and sizes of coal produced in the various districts; to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed. The minimum prices established as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return as provided in section 4 of this code by an amount greater than necessary to accomplish such coordination, to the end that the return per net [fol. 76] ton upon the entire tonnage of the minimum price area shall approximate and be not less than the weighted average of the total costs per net ton of the tonnage of such minimum price area. Such coordinated prices and rules

and regulations, together with the data upon which they are predicated, shall be submitted to the Commission, which may approve, disapprove, or modify the same to establish and maintain such fair competitive relationship, and such approval, disapproval, or modification shall be binding upon all code members within the affected districts. No minimum price shall be established that permits dumping. On the petition of any district board or other party in interest or on its own motion, after notice to the district boards, the Commission may at any time conduct hearings to determine whether the foregoing method of fixing minimum prices under section 4 is prejudicial to any district with respect to the fair opportunity of such district to market its coal. Should the Commission so find, and further find that the prejudice cannot be removed through the coordination of minimum prices as provided for in this section 5, then the Commission may establish a different basis for determining minimum prices in such district, to the end that fair and competitive prices shall prevail in the marketing of the coal produced in such district: Provided, That the minimum prices so established as to any such district shall yield a return, per net ton, not less than the weighted average of the total costs, per net ton, of the tonnage of such district.

Sec. 6. When, in the public interest, the Commission deems it necessary to establish maximum prices for coal in order to protect the consumer of coal against unreasonably high prices therefor, the Commission shall have the right to fix maximum prices free on board transportation facilities for coal in any district. Such maximum prices shall be established at a uniform increase above the minimum prices in effect within the district at the time, so that in the aggregate the maximum prices shall yield a reasonable return above the weighted average total cost of the district: Provided, That no maximum price shall be established for any mine which shall not return cost plus a reasonable profit.

Sec. 7. If any code member or district board, or any State or political subdivision of a State, shall be dissatisfied with such coordination of prices or rules and regulations, or by a failure to establish such coordination of prices or rules and regulations, or by the maximum prices estab-

lished for him or it pursuant to section 6 of this code, he or it shall have the right, by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of sections 5 and 6 of this code, which order shall be binding upon all parties in interest. Pending final disposition of such petition, and upon reasonable showing of necessity therefor, the Commission may make such preliminary or temporary order as in its judgment may be appropriate, and not inconsistent with the provisions of said Act.

Sec. 8. Subject to the exceptions provided in section 12 of said Act, no coal shall be sold or delivered at a price below the minimum or above the maximum therefor approved or established by the Commission, and the sale or delivery of coal at a price below such minimum or above such maximum shall constitute a violation of this code.

Subject to the exceptions provided in section 12 of said Act, a contract for the sale of coal at a price below the minimum or above the maximum therefor approved or established by the Commission at the time of the making of the contract shall constitute a violation of this code, and such contract shall be invalid and unenforceable.

From and after the date of approval of said Act, until prices shall have been established pusuant to sections 4 and 5 of part II of this code, no contract for the sale of coal shall be made providing for delivery for a period longer than thirty days from the date of the contract.

While said Act is in effect no code member shall make any contract for the sale of coal for delivery after the expiration date of said Act at a price below the minimum or above the maximum therefor approved or established by the Commission and in effect at the time of making the contract.

The minimum prices established in accordance with the provisions of this code shall not apply to coal sold by a code member and shipped outside the domestic market. The domestic market shall include all points within the continental United States and Canada, and car-ferry shipments to the Island of Cuba. Bunker coal delivered to steamships for consumption thereon shall be regarded as shipped within the domestic market. Maximum prices es-

tablished in accordance with the provisions of this code shall not apply to coal sold by a code member and shipped outside the continental United States.

Sec. 9. All data, reports, and other information in the possession of the National Recovery Administration in relation to bituminous coal shall be available to the Commission for the administration of said Act.

Sec. 10. The price provisions of said Act shall not be evaded or violated by or through the use of docks or other storage facilities or transportation facilities, or by or [fol. 77] through the use of subsidiaries, affiliated sales of transportation companies or other intermediaries or instrumentalities, or by or through the absorption, directly or indirectly, of any transportation or incidental charge of whatsoever kind or character, or any part thereof. The Commission is hereby authorized, after investigation and hearing, and upon notice to the interested parties, to make and issue rules and regulations to make this section effective.

Sec. 11. All sales and contracts for the sale of coal shall be subject to the code prices herein provided for and in effect at the time of the making of such sales and contracts. The Commission shall prescribe the price allowance to and receivable by persons who purchase coal for resale, and resell it in not less than cargo or railroad carload lots; and shall require the maintenance by such persons, in the resale of coal, of the minimum prices established under said Act.

Unfair Methods of Competition

Sec. 12. The following practices shall be unfair methods of competition and shall constitute violations of this code:

1. The consignment of unordered coal, or the forwarding of coal which has not actually been sold, consigned to the producer or his agent: Provided, however, That coal which has not actually been sold may be forwarded, consigned to the producer or his agent at rail or track yards, tidewater ports, river ports, or lake ports, or docks beyond such ports. Such limitations on the consignment of coal shall not apply to the following classes: Bunker

coal, coal applicable against existing contracts, coal for storage (other than in railroad cars) by the producer or his agent in rail or track yards or on docks, wharves, or other yards for resale by the producer or his agent.

2. The adjustment of claims with purchasers of coal in such manner as to grant secret allowances, secret rebates, or secret concessions, or other price discrimination.

3. The prepayment of freight charges with intent to or having the effect of granting a discriminatory credit allowance.

4. The granting in any form of adjustments, allowances, discounts, credits, or refunds to purchasers or sellers of coal, for the purposes or with the effect of altering retroactively a price previously agreed upon, in such manner as to create price discrimination.

5. The predating or postdating of any invoice or contract for the purchase or sale of coal, except to conform to a bona fide agreement for the purchase or sale entered into on the predate.

6. The payment or allowance in any form or by any device of rebates, refunds, credits, or unearned discounts, or the extension to certain purchasers of services or privileges not extended to all purchasers under like terms and conditions, or under similar circumstances.

7. The attempt to purchase business, or to obtain information concerning a competitor's business by concession, gifts, or bribes.

8. The intentional misrepresentation of any analysis or of analyses, or of sizes, or the intentional making, causing, or permitting to be made, or publishing, of any false, untrue, misleading, or deceptive statement by way of advertising, invoicing, or otherwise concerning the size, quality, character, nature, preparation, or origin of any coal bought, sold or consigned.

9. The unauthorized use, whether in written or oral form, of trade marks, trade names, slogans, or advertising matter already adopted by a competitor, or any deceptive approximation thereof.

10. Inducing or attempting to induce, by any means or device whatsoever, a breach of contract between a competitor and his customer during the term of such contract.

11. Splitting or dividing commissions, broker's fees, or brokerage discounts, or otherwise in any manner directly or indirectly using brokerage commissions or jobbers' arrangments or sales agencies for making discounts, allowances, or rebates, or prices other than those determined under said Act, to any industrial consumer or to any retailers, or to others, whether of a like or different class.

12. Selling to, or through, any broker, jobber, commission account, or sales agency, which is in fact or in effect an agency or an instrumentality of a retailer or an industrial consumer or of an organization of retailers or industrial consumers, whereby they or any of them secure either directly or indirectly a discount, dividend, allowance, or rebates, or a price other than that determined in the manner prescribed by said Act.

13. Violations of the provisions of this code.

It shall not be an unfair method of competition or a violation of this code or any requirement of said Act (1) to sell to or through any bona fide and legitimate farmer's cooperative organization duly organized under the laws of any State, Territory, the District of Columbia, or the United States whether or not such organization grants [fol. 78] rebates, discounts, patronage dividends, or other similar benefits to its members, (2) to sell through any intervening agency to any such cooperative organization, or (3) to pay or allow to any such cooperative organization or to any such intervening agency any discount, commission, rebate, or dividend ordinarily paid or allowed, or permitted by this code to be paid or allowed, to other purchasers for purchases in wholesale or middleman quantities.

Sec. 13. The Commission shall have jurisdiction to hear and determine written complaints made charging any violation of this code specified in this part II. It shall make and publish rules and regulations for the consideration and hearing of any such complaint, and all interested parties shall be required to conform thereto. The Commission shall make due effort toward adjustment of such com-

plaints and shall endeavor to compose the differences of the parties, and shall make such order or orders in the premises, from time to time, as the facts and the circumstances warrant. Any such order shall be subject to review as are other orders of the commission.

Part III—Labor Relations

Sec. 14. Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint, or coercion of employers, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; and no employee and no one seeking employment shall be required as a condition of employment to join any company union.

Sec. 15. Employees shall have the right of peaceable assemblage for the discussion of the principles of collective bargaining, shall be entitled to select their own checkweighman to inspect the weighing or measuring of coal, and shall not be required as a condition of employment to live in company houses or to trade at the store of the employer.

Sec. 16. The Labor Board shall have authority to adjudicate disputes arising under sections 14 and 15 of this part III, and to determine whether or not an organization of employees has been promoted, or is controlled or dominated by an employer in its organization, management, policy, or election of representatives; and for the purpose of determining who are the freely chosen representatives of the employees the Board may order and under its supervision may conduct an election of employees for that purpose. The Labor Board may order a code member to meet the representatives of its employees for the purpose of collective bargaining.

Sec. 17. The Labor Board may offer its services as mediator in any dispute between a producer and its employees where such dispute is not determined by the tribunal set up in a bona fide collective contract; and upon the written submission by the parties requesting an award on a stated matter signed by the duly accredited representatives of

the employer and employees, the Labor Board may arbitrate the matter submitted.

Sec. 18. Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the preceding calendar year and the representatives of more than one-half the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agreement or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts.

Annex to Code—Schedule of Districts

Eastern Pennsylvania

District 1. The following counties in Pennsylvania: Bedford, Blair, Bradford, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Elk, Forest, Fulton, Huntingdon, Jefferson, Lycoming, McKean, Mifflin, Potter, Somerset, Tioga.

Armstrong County, including mines served by the P. & S. R. R. on the west bank of the Allegheny River, and north of the Conemaugh division of the Pennsylvania Railroad.

Fayette County, all mines on and east of the line of Indian Creek Valley branch of the Baltimore and Ohio Railroad.

Indiana County, north of but excluding the Saltsburg branch of the Pennsylvania Railroad between Edri and Blairsville, both exclusive.

Westmoreland County, including all mines served by the Pennsylvania Railroad, Torrance, and east.

[fol. 79] All coal-producing counties in the State of Maryland.

The following counties in West Virginia: Grant, Mineral, and Tucker.

Western Pennsylvania

District 2. The following counties in Pennsylvania: Allegheny, Beaver, Butler, Greene, Lawrence, Mercer, Venango, Washington.

Armstrong County, west of the Allegheny River and exclusive of mines served by the P. & S. R. R.

Indiana County, including all mines served on the Saltsburg branch of the Pennsylvania Railroad north of Conemaugh River.

Fayette County, except all mines on and east of the line of Indian Creek Valley branch of the Baltimore and Ohio Railroad.

Westmoreland County, including all mines except those served by the Pennsylvania Railroad from Torrance, east.

Northern West Virginia

District 3. The following counties in West Virginia: Barbour, Braxton, Calhoun, Doddridge, Gilmer, Harrison, Jackson, Lewis, Marion, Monongalia, Pleasants, Preston, Randolph, Ritchie, Roane, Taylor, Tyler, Upshur, Webster, Wetzel, Wirt Wood.

That part of Nicholas County including mines served by the Baltimore and Ohio Railroad and north.

Ohio

District 4. All coal-producing counties in Ohio.

Michigan

District 5. All coal-producing counties in Michigan.

Panhandle

District 6. The following counties in West Virginia: Brooke, Hancock, Marshall, and Ohio.

Southern Numbered 1

District 7. The following counties in West Virginia: Greenbrier, Mercer, Monroe, Pocahontas, Summers.

Fayette County, east of Gauley River and including the Gauley River branch of the Chesapeake and Ohio Railroad and mines served by the Virginia Railway.

McDowell County, that portion served by the Dry Fork branch of the Norfolk and Western Railroad and east thereof.

Raleigh County, excluding all mines on the Coal River branch of the Chesapeake and Ohio Railroad.

Wyoming County, that portion served by the Gilbert branch of the Virginian Railroad lying east of the mouth of Skin Fork of Guyandot River and that portion served by the main line and the Glen Rogers branch of the Virginian Railroad.

The following counties in Virginia: Montgomery, Pulaski, Wythe, Giles, Craig.

Tazewell County, that portion served by the Dry Fork branch to Cedar Bluff and from Bluestone Junction to Boissevain branch of the Norfolk and Western Railroad and Richlands-Jewell Ridge Branch of the Norfolk and Western Railroad.

Buchanan County, that portion served by the Richlands-Jewell Ridge branch of the Norfolk and Western Railroad and that portion of said county on the head waters of Dismal Creek, east of Lynn Camp Creek (a tributary of Dismal Creek).

Southern Numbered 2

District 8. The following counties in West Virginia: Boone, Clay, Kanawha, Lincoln, Logan, Mason, Mingo, Putnam, Wayne, Cabell.

Fayette County, west of, but not including mines of the Gauley River branch of the Chesapeake and Ohio Railroad.

McDowell County, that portion not served by and lying west of the Dry Fork branch of the Norfolk and Western Railroad.

Raleigh County, all mines on the Coal River branch of the Chesapeake and Ohio Railroad and north thereof.

Nicholas County, that part south of and not served by the Baltimore and Ohio Railroad.

Wyoming County, that portion served by Gilbert branch of the Virginian Railroad lying west of the mouth of Skin Fork of Guyandot River.

The following counties in Virginia: Dickinson, Lee, Russell, Scott, Wise.

All of Buchanan County, except that portion on the head waters of Dismal Creek, east of Lynn Camp Creek (tributary of Dismal Creek) and that portion served by the Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

Tazewell County, except portions served by the Dry Fork branch of Norfolk and Western Railroad and branch from Bluestone Junction to Boissevain of Norfolk and Western Railroad and Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

[fol. 80] The following counties in Kentucky: Bell, Boyd, Breathitt, Carter, Clay, Elliott, Floyd, Greenup, Harlan, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Letcher, Leslie, McCreary, Magoffin, Martin, Morgan, Owsley, Perry, Pike, Rockcastle, Wayne, Whitley.

The following counties in Tennessee: Anderson, Campbell, Claiborne, Cumberland, Fentress, Morgan, Overton, Roane, Scott.

The following counties in North Carolina: Lee, Chatham, Moore.

West Kentucky

District 9. The following counties in Kentucky: Butler, Christian, Crittenden, Daviess, Hancock, Henderson, Hopkins, Logan, McLean, Muhlenberg, Ohio, Simpson, Todd, Union, Warren, Webster.

Illinois

District 10. All coal-producing counties in Illinois.

Indiana

District 11. All coal-producing counties in Indiana.

Iowa

District 12. All coal-producing counties in Iowa.

Southeastern

District 13. All coal-producing counties in Alabama.

The following counties in Georgia: Dade, Walker.

The following counties in Tennessee: Marion, Grundy, Hamilton, Bledsoe, Sequatchie, White, Van Buren, Warren, McMinn, Rhea.

Arkansas-Oklahoma

District 14. The following counties in Arkansas: All counties in the State.

The following counties in Oklahoma: Haskell, Le Flore, Sequoyah.

Southwestern

District 15. All coal-producing counties in Kansas. All coal-producing counties in Texas. All coal-producing counties in Missouri.

The following counties in Oklahoma: Coal, Craig, Latimer, Muskogee, Okmulgee, Pittsburg, Rogers, Tulsa, Wagoner.

Northern Colorado

District 16. The following counties in Colorado: Adams, Arapahoe, Boulder, Douglas, Elbert, El Paso, Jackson, Jefferson, Larimer, Weld.

Southern Colorado

District 17. The following counties in Colorado: All counties not included in northern Colorado district.

The following counties in New Mexico: All coal-producing counties in the State of New Mexico, except those included in the New Mexico district.

New Mexico

District 18. The following counties in New Mexico: Grant, Lincoln, McKinley, Rio Arriba, Sandoval, San Juan, San Miguel, Santa Fe, Socorro.

Wyoming

District 19. All coal-producing counties in Wyoming.

Utah

District 20. All coal-producing counties in Utah.

North Dakota-South Dakota

District 21. All coal-producing counties in North Dakota. All coal-producing counties in South Dakota.

Montana

District 22. All coal-producing counties in Montana.

Washington

District 23. All coal-producing counties in Washington.
Approved, August 30, 1935.
Dated this 9th day of October, 1935.

National Bituminous Coal Commission, by C. F. Hosford, Jr., Chairman; George E. Acret, Walter H. Maloney, C. E. Smith, Percy Tetlow, Commissioners. (Seal.)

[fol. 81] United States

Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

General Order No. 2

An Order Providing the Form of Acceptance of the Bituminous Coal Code

Pursuant to authority contained in Act of Congress, entitled "Bituminous Coal Conservation Act of 1935", it is hereby ordered, for the purposes, and to be effective as, contemplated by said Act, that the form of acceptance for membership in the Bituminous Coal Code, formulated and prescribed by this Commission, in its General Order No. 1, on the 9th day of October, 1935, shall be as follows:

Form 1

Acceptance of Membership in the Bituminous Coal Code

The undersigned bituminous coal producer, hereby accepts the Bituminous Coal Code, formulated and prescribed October 9, 1935, by the National Bituminous Coal Commission, in General Order No. 1 of said Commission, pursuant to and under the provisions of an Act of Congress, entitled "Bituminous Coal Conservation Act of 1935."

Neither this acceptance, nor compliance with the provisions of said Code, nor acceptance of the drawback provided by said Act, shall be held to preclude or estop the undersigned from contesting the constitutionality of any provision of said Code or of said Act, or the validity thereof as applicable to the undersigned, in any proceeding authorized by said Act or any other appropriate proceeding at law or in equity.

Dated this ..... day of ....., 193....

——— ———, (Seal)
——— ———, (Seal)
——— ———, (Seal)

(Note: The above form of acceptance may not be altered by the acceptors in any respect whatsoever and must be signed and acknowledged before an officer qualified to administer an oath. When in behalf of a partnership, it must be signed and acknowledged by a partner thereof, and in behalf of a corporation, by the president or vice president, and attested by the secretary or assistant secretary. A form of acknowledgment conformable to the laws of the state in which the acceptance is executed shall be thereto attached.)

The above form of acceptance shall be known as "Form 1", and, if the producer desires to accept the Code, must be signed and acknowledged in triplicate, one triplicate original to be filed with the National Bituminous Coal Commission at Washington, D. C., another with the District Board Secretary, and another retained in the files of the producer. Said acceptance shall become effective only when properly executed and filed with the Commission at Washington, D. C.

Dated this 9th day of October, 1935.

National Bituminous Coal Commission. By C. F. Hosford, Jr., Chairman, George E. Acret, Walter H. Maloney, C. E. Smith, Percy Tetlow, Commissioners. (Seal.)

[fol. 82] United States

Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

General Order No. 3

An Order Providing for the Organization of the District Boards

Pursuant to authority contained in Act of Congress, entitled "Bituminous Coal Conservation Act of 1935", it is hereby ordered by the National Bituminous Coal Commission, in regular meeting assembled, as follows:

1. District boards of coal producers shall be forthwith organized pursuant to the provisions of said Bituminous Coal Conservation Act of 1935 and in conformity with the provisions of this order.

2. The following are hereby appointed acting deputy district secretaries for this Commission in their respective districts:

District	*Name*	*Address*
1	W. A. Jones	c/o Central Pennsylvania Coal Producers Association, Altoona, Pennsylvania.
2	B. H. Canon	Oliver Building, Pittsburgh, Pennsylvania.
3	T. J. Ashcraft	P. O. Box 1164, Fairmont, West Virginia.
4	Ezra Van Horn	Rockefeller Bldg., Cleveland, Ohio.
5	Warren E. Pippin	Graebner Building, Saginaw, Michigan.
6	Geo. A. Blackford	500 Board of Trade Building, Wheeling, West Virginia.
7	P. M. Snyder	Mt. Hope, West Virginia.
8	C. E. Bockus	75 West Street, New York City.
9	C. E. Reed	Starks Building, Louisville, Kentucky.

District	Name	Address
10	Fred Wilkey	309 West Jackson Boulevard, Chicago, Illinois.
11	Jonas Waffle	Opera House Block, Terre Haute, Indiana.
12	M. G. Youngquist	Polk Building, Des Moines, Iowa.
13	James L. Davidson	Webb Crawford Building, Birmingham, Alabama.
14	S. A. Bramlette	Merchants National Bank Building, Fort Smith, Arkansas.
15	W. E. Blucher	540 Dwight Building, Kansas City, Missouri.
16	N. C. Brooks	308 Sugar Building, Denver, Colorado.
17	F. O. Sandstrom	Boston Building, Denver, Colorado.
18	A. R. Litts	Box 623, Albuquerque, New Mexico.
19	L. W. Mitchell	610 Boyd Building, Cheyenne, Wyoming.
20	B. P. Manley	Ezra Thompson Building, Salt Lake City, Utah.
21	E. M. Hendricks	307 Broadway, Bismarck, North Dakota.
22	M. F. Purcell	c/o Montana Coal Operators Ass'n., Billings, Montana.
23	D. S. Hanley	Chamber of Commerce Building, Seattle, Washington.

The appointment of an acting deputy district secretary shall be effective upon his taking and signing an oath of office before a notary public or other officer qualified to administer an oath.

[fol. 83] 3. Each of such acting deputy district secretaries shall serve without compensation but shall be reimbursed by his district board, when such district board shall be organized, for his actual expenses incurred in complying with this order.

4. Each of the above-named acting deputy district secretaries shall accept his appointment by telegraphing, prepaid, to this Commission at Washington, D. C., such ac-

ceptance within 24 hours of the receipt of this order, stating therein the date, hour, and place of such meeting and the quantity of forms required for his use in organizing his district in conformity with this order. The Commission reserves the right, at any time, to revoke the appointment of any acting deputy district secretary without prior notice or hearing.

5. The duties of an acting deputy district secretary shall be as follows:

(a) To fix the time and place of a meeting for the organization of the district board in conformity with the provisions of this order and of said Act, such meeting to be held within 15 days of the date of the receipt of this order.

(b) To give notice, in the manner and form herein provided, of the time and place of such meeting to all known bituminous coal producers in his district, and to make distribution of all forms as required by this order.

(c) To call said meeting to order at the time and place fixed in said notice.

(d) To receive and safely keep for delivery to the district board, when organized, all proxies and tonnage affidavits herein provided for and, prior to the meeting, to list and arrange such proxies and affidavits in a manner such as to best facilitate their use at the meeting.

(e) To act as temporary chairman of said meeting and to do such other things as the Commission may by its subsequent instructions or orders direct.

(f) Within five days after said meeting, to file with the Commission at Washington, D. C., a full report of the proceedings of said meeting, together with proof of service and proof of publication of said notice in conformity with the requirements of this order, and upon the filing of such report the appointment of such acting deputy district secretary shall terminate.

6. The notice of said meeting shall be in the form attached to this order, marked "Form 2", and made a part hereof.

7. Not less than ten days prior to the day fixed for said meeting, said notice shall be published once in a newspaper

of general circulation in the district, and, not less than ten days prior to the day fixed for said meeting, a copy of said notice upon said Form 2 shall be mailed, postage prepaid, to all known bituminous coal producers in the district, together with a copy of General Orders No. 1, 2, and 3, and, in duplicate, Form 4, and in triplicate, Forms 1, and 5.

8. Proof of service of said notice shall be made in the form attached to this order, marked "Form 3", and made a part hereof. Proof of publication of said notice shall be made by affidavit of the publisher of the newspaper in a form customary in the district.

9. Qualified coal producers, as defined in this order, and properly represented at the meeting, shall proceed to a determination of the number of members to comprise the district board in accordance with the provisions of Sub-Section (a) of Part I of Section 4 of said Act. Thereafter, an election of members of the district board shall be proceeded with as provided in said Section 4 and in this order, provided: That one vacancy shall be left in the total number of members of the board, such vacancy to be thereafter filled by selection by an organization of employees as provided in said Act, and provided further: That the number of members elected at the meeting shall be an even number.

10. Each qualified coal producer may attend said meeting and vote in person, or by proxy, in the manner provided in said Act.

11. All proxies shall be in the form attached to this order, marked "Form 4", and made a part hereof, and shall be in fact filed with the acting deputy district secretary not less than 48 hours prior to the date and hour fixed for said meeting. No proxies shall under any circumstances have any validity which shall not have been so filed.

[fol. 84] 12. A producer may not vote by proxy or otherwise unless he be a qualified producer. A qualified producer, within the meaning of this order, shall be a producer, as defined in Section 19 of said Act, who, 48 hours prior to the date and hour of said meeting, has performed each of the following acts: (a) Mailed to the Commission at

Washington, D. C., his or its acceptance of the Bituminous Coal Code, duly executed, on Form 1, pursuant to General Order No. 1 of the Commission. (b) Filed with (actually in the possession of) the acting deputy district secretary, for his delivery to the secretary of the district board when elected, a duplicate original of said acceptance. (c) Filed, in duplicate, with the acting deputy district secretary, an affidavit of tonnage in the form hereinafter provided, sworn to before an officer qualified to administer an oath.

13. The affidavit of tonnage, to be executed by producers desiring to qualify, shall be made in duplicate upon the form attached hereto, marked "Form 5," and made a part hereof. One duplicate original of the affidavit of tonnage received by the acting deputy district secretary shall be filed with the Commission at Washington, D. C., and the other duplicate original delivered to the secretary of the district board when elected.

14. No producer, who shall not be a qualified producer as herein provided, shall have any vote or voice at said meeting, or right to the floor thereof.

15. Following the election of the members of the district board, the board shall proceed to organize as promptly as possible, and shall transmit to the Commission, for its consideration and approval, a full report of said meeting, which report shall be duly certified. Said report shall include such information as will inform the Commission as to whether or not members of the said board are truly representative of all the mines of the district, as provided in Section 4, Part I, Sub-Section (a) of said Act, and as to whether or not said meeting was held in a locality suitable to the convenience of a majority of the producers of the district.

16. District boards, immediately following said meeting, shall levy an initial assessment upon all those subject to their jurisdiction, as provided in said Act, each paying his proportionate share computed on the basis of his tonnage for the calendar year 1934, and thereafter shall levy quarterly assessments upon the same, each paying his proportionate share computed on the basis of his tonnage for the preceding quarter.

17. District boards, when organized, shall be known as "Bituminous Coal Producers Board for District No. —."

18. No district board organized at a meeting called, noticed, or held prior to the date of the issuance of this order, or organized other than in conformity therewith, will be recognized by the Commission.

Dated this 9th day of October, 1935.

National Bituminous Coal Commission, by C. F. Hosford, Jr., Chairman; George E. Acret, Walter H. Maloney, C. E. Smith, Percy Tetlow, Commissioners. (Seal)

[fol. 85] United States Department of the Interior

National Bituminous Coal Commission

Washington, D. C.

Name of Producer, —— ——.
Post Office Address, ——.
District No., ——.

Acceptance of Membership in the Bituminous Coal Code

The undersigned, bituminous coal producer, hereby accepts the Bituminous Coal Code, formulated and prescribed October 9, 1935, by the National Bituminous Coal Commission, in General Order No. 1 of said Commission, pursuant to and under the provisions of an Act of Congress, entitled "Bituminous Coal Conservation Act of 1935."

Neither this acceptance, nor compliance with the provisions of said Code, nor acceptance of the drawback provided by said Act, shall be held to preclude or estop the undersigned from contesting the constitutionality of any provision of said Code or of said Act, or the validity thereof as applicable to the undersigned, in any proceeding authorized by said Act or any other appropriate proceeding at law or in equity.

Dated this — day of ——, 193—.

—— ——, (Seal)
—— ——, (Seal)
—— ——, (Seal)

(Note: The above form of acceptance may not be altered by the acceptors in any respect whatsoever and must be signed and acknowledged before an officer qualified to administer an oath. When in behalf of a partnership it must be signed and acknowledged by a partner thereof, and in behalf of a corporation, by the president or vice president, and attested by the secretary or assistant secretary. A form of aeknowledgment conformable to the laws of the state in which the acceptance is executed shall be thereto attached.)

Attention is called to the fact that, pursuant to Paragraph 12 of General Order No. 3, an executed and acknowledged duplicate original of the above form must be mailed to the Commission at Washington, D. C., and an executed and acknowledged duplicate original thereof must be filed with (actually in the possession of) the acting deputy district secretary at least 48 hours prior to the date and hour fixed for the District Board meeting..

[fol. 86] United States

Department of the Interior

National Bituminous Coal Commission,

Washington, D. C.

Proxy for Organization Meeting of District Boards

STATE OF ——
County of ——, ss:

The undersigned, a coal producer in District No. —, as defined by the Bituminous Coal Conservation Act of 1935, having become a qualified producer on the — day of ——, 1935, in conformity with General Order No. 3 of the National Bituminous Coal Commission, does hereby make, constitute, and appoint —— his, her or its true and lawful proxy and attorney, to attend the organization meeting of the bituminous coal producers of the said district, to be held at — o'clock, —M., on the — day of ——, 1935, and any adjournment or adjournments of the said meeting, and there to cast any and all votes the undersigned could or would cast, if personally present, in creating the district board and voting upon any and all matters necessary thereto and properly coming before the said meeting;

hereby ratifying and confirming any and all lawful acts of the said proxy and attorney done in conformity herewith.

In witness whereof the undersigned has caused these presents to be duly executed this — day of ——, 193—.

—— (Seal)

(Note: The above proxy must be signed and acknowledged before an officer qualified to administer an oath. When in behalf of a partnership it must be signed and acknowledged by a partner thereof, and when in behalf of a corporation, by the president, vice president, or secretary thereof. A form of acknowledgment conformable to the laws of the state in which the proxy is executed shall be thereto attached.)

Attention is called to the fact that, if the producer desires to vote by proxy at the organization meeting of the District Board, an executed and acknowledged original of this form must be filed with (actually in the possession of) the acting deputy district secretary at least 48 hours prior to the date and hour fixed for the District Board meeting, pursuant to Paragraph 11 of General Order No. 3.

[fol. 87]

United States

Department of the Interior

National Bituminous Coal Commission,

Washington, D. C.

Affidavit of Tonnage

STATE OF ——

County of ——, ss:

——, being duly sworn on oath, deposes and says that -he makes this Affidavit of Tonnage pursuant to General Order No. 3 of the National Bituminous Coal Commission, dated the 9th day of October, 1935, and that -he is —— (Individual proprietor, copartner, president, etc.) of —— (Name of producer) —— a- —— (Whether an individual, copartnership, or corporation): that said producer is now operating one or more bituminous coal mines located in District No. —, as designated in Act of Congress, entitled "Bituminous Coal Conservation Act of 1935"; that during

the calendar year 1934 said producer actually produced bituminous coal from a mine or mines, owned, leased, or operated by ——, (him, her, it), within said District, the names of which mine or mines, the respective locations thereof, and the actual number of tons of bituminous coal produced therefrom during said calendar year, being as follows, to wit:

Name of Mine	Location of Mine	1934 Tonnage of Mine
——	——	——

Affiant hereby certifies that he has mailed to the Commission, at Washington, D. C., in behalf of said producer, an acceptance of the Bituminous Coal Code, duly executed, on Form 1, pursuant to the requirements of General Order No. 3 of the Commission, and that the representations and facts aforesaid are true and correct upon — (his, her) personal knowledge thereof.

—— —— (Seal)

Sworn and subscribed before me this —— day of ——, 193—.

—— —— (Title of officer administering oath.)

(Note: The above affidavit when made in behalf of a partnership, must be made by one of the partners thereof; when in behalf of a corporation it must be made by either the president, vice president, or secretary thereof. This affidavit must be filed, in duplicate, with the acting deputy district secretary not later than 48 hours prior to the date and hour of the organization meeting provided in General Order No. 3 of said Commission. The acting deputy district secretary shall transmit one of such duplicate originals to the Commission at Washington, D. C. and the other to the secretary of the district board, when elected.)

Attention is called to the fact that, pursuant to Paragraph 12 of General Order No. 3, two executed and acknowledged duplicate originals of the above form must be filed with (actually in the possession of) the acting deputy district secretary at least 48 hours prior to the date and hour fixed for the District Board meeting.

[fol. 88] IN SUPREME COURT OF DISTRICT OF COLUMBIA

RULE TO SHOW CAUSE—Filed October 24, 1935

On consideration of the allegations contained in the verified Bill of Complaint filed herein the 31st day of August, 1935, and the further facts appearing by affidavit of the plaintiff, James Walter Carter, filed herein on the 24th day of October, 1935, it is by the Court this 24th day of October, 1935,

Adjudged, ordered and decreed that Carter Coal Company, George L. Carter as Vice-President and a Director of said Company, C. A. Hall as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter S. Denham as Vice-Presidents of said Company; Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, and each of them, appear in this Court on the 28th day of October, 1935, at the hour of 1:30 o'clock p. m., or as soon thereafter as counsel may be heard before the [fol. 89] Motions Justice of this Court, provided a copy of the affidavit of James Walter Carter above mentioned and a copy of this order shall be served on them by delivering copies thereof to their respective counsel on or before the 25th day of October, 1935, and show cause, if any they have, why an order should not be made and entered herein, pendente lite, to wit: (a) enjoining the defendant Carter Coal Company, and the defendants George L. Carter as Vice-President and a Director of said Company, C. A. Hall as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter S. Denham as

Vice-Presidents of said Company, pending final hearing of this case, from executing or filing an acceptance of the Bituminous Coal Code, and from paying any tax attempted to be imposed upon the defendant Carter Coal Company pursuant to the Bituminous Coal Conservation Act of 1935; (b) enjoining the defendant Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States, his agents, assistants, deputies or employees, pending final hearing of this cause, from in any manner, directly or indirectly, assessing or collecting from the defendant Carter Coal Company the taxes imposed by said Bituminous Coal Conservation Act of 1935; from causing any Collector or Deputy Collector of Internal Revenue of the United States, or any of said defendant's subordinates or assistants, or any other Government officer, to assess or collect said taxes from defendant Carter Coal Company; and from issuing any regulations or instructions to the Collectors or Deputy Collectors of Internal Revenue or to [fol. 90] said defendant's subordinates or assistance, or to any other Government officials, respecting the collection of said taxes from defendant Carter Coal Company; (c) enjoining the defendants M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland, Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue in and for Division No. 2 of the Collection District of Maryland, and John B. Colpoys, individually and as United States Marshal in and for the District of Columbia, their agents, assistants, deputies and employees, pending final hearing of this case, from collecting, or attempting to collect, directly or indirectly, from Carter Coal Company any tax or imposition purporting to be levied or assessed against said Company under the Bituminous Coal Conservation Act of 1935 on account of the sale or other disposal of bituminous coal produced by Carter Coal Company as described in this complaint; from seizing any of the property of said Company herein because the said tax has not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceeding against the property of said Company because the said tax has not been paid; from enforcing any of the remedies provided for the collection of Internal Rev-

enue of the United States against said Company, its property, officers or agents with respect to the said tax; and (d) enjoining the defendants Homer S. Cummings, individually and as Attorney General of the United States, Stanley Reed, individually and as Solicitor General and Acting Attorney General of the United States, and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, their agents, assistants, [fol. 91] deputies and employees, pending final hearing of this case, from attempting to collect by suits or prosecutions, or otherwise, any tax, penalty or fine, mentioned in, or imposed by said Act, from defendant Carter Coal Company or any of its officers or Directors and from taking any steps whatever, legal or otherwise, to induce, coerce or compel the defendant Carter Coal Company or its officers or Directors to comply with the provisions of the Bituminous Coal Conservation Act of 1935 or the Code provided for thereunder.

And that said defendants also show cause why plaintiff should not have such other, further, and general relief as the nature of the case may require and the Court may deem just and proper in the premises.

Alfred A. Wheat, Chief Justice.

Receipt of a copy of the above rule to show cause and of the affidavit of James Walter Carter referred to therein is hereby acknowledged this — day of October, 1935.

Attorney for Defendants Carter Coal Company and Its Officers.

Attorneys for Defendants Guy T. Helvering and Other Government Officers.

[fol. 92] In Supreme Court of District of Columbia

Return of Defendants Guy T. Helvering et al., to Rule to Show Cause—Filed October 28, 1935

Come now severally defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence

C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, as United States Attorney in and for the District of Columbia, and in response to the rule to show cause heretofore issued herein, respectfully show that plaintiff is not entitled to an injunction pendente lite under said rule, for the following reasons:

A. This cause is now set for trial in this Court on October 28, 1935. The tax provided for in the Bituminous Coal Conservation Act of 1935 will not become payable until January 1, 1936. Prior to that date this Court will have been able to pass upon the application for a permanent injunction. Consequently, no injury to the plaintiff herein can possibly occur during the pendency of this trial.

B. The bill of complaint herein fails to disclose that [fol. 93] either the plaintiff or the so-called defendant Carter Coal Company are threatened with immediate or any injury at the hands of these responding defendants, or any of them.

C. The said bill fails to disclose that either the plaintiff or the so-called defendant Carter Coal Company is in any immediate or any danger of suffering any injury at the hands of these defendants, or any of them, or the nature, extent or probability of the supposititious injuries to which plaintiff fears he may be subjected in the future.

D. The said bill affirmatively discloses that the so-called defendant Carter Coal Company has not availed itself of the complete and adequate judicial and administrative remedies provided in said Bituminous Coal Conservation Act of 1935 for its protection, which said remedies are adequate.

E. In so far as said bill seeks to enjoin these responding defendants from collecting or attempting to collect such taxes as may hereafter be assessed against defendant Carter Coal Company under the provisions of Section 3

of said Bituminous Coal Conservation Act, the same cannot be maintained (a) because of the provisions of Section 3224, R. S. (Title 26, § 154 U. S. C.), and (b) because to that extent this suit is a suit against the United States and the United States has not consented to be sued.

Wherefore, these responding defendants pray that plaintiff take nothing by reason of the issuance of said rule [fol. 94] to show cause and that the same be vacated and discharged.

Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States, M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John P. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States Leslie C. Garnett, as United States Attorney in and for the District of Columbia; by John Dickinson, John Dickinson, Assistant Attorney General, Their Attorney. John Dickinson, Assistant Attorney General; Carl McFarland, Special Assistant to the Attorney General; F. B. Critchlow, Special Assistant to the Attorney General; David A. Pine, Assistant United States Attorney; John J. Wilson, Assistant United States Attorney, Attorneys for Responding Defendants.

[fol. 95] In Supreme Court of District of Columbia

Return of Carter Coal Co., et al., to Rule to Show Cause —Filed October 28, 1935

Now come Carter Coal Company, George L. Carter as Vice-President and Director of said Company, C. A. Hall as Secretary-Treasurer and a Director of said Company,

John Callahan, Joseph W. Gorman and Walter S. Denham as Vice-Presidents of said Company, defendants herein and as joint return to the rule to show cause entered herein on the 24th day of October, 1935, show as follows:

1. Said defendants incorporate herein by reference their Answer in this cause, and admit the facts set forth in the affidavit of the plaintiff in support of a preliminary injunction filed herein.

2. These defendants respectfully submit to the Court the question whether or not a preliminary injunction should issue as prayed for in the Bill of Complaint, and pray that, in the event an order be made and entered herein, pendente lite, enjoining these defendants from executing or filing an acceptance of the Bituminous Coal Code pursuant to the Bituminous Coal Conservation Act of 1935, the Court issue its writ of injunction enjoining the collection of the fifteen per cent tax provided for by the Bituminous Coal Conservation Act of 1935.

Carter Coal Company, by George L. Carter, (George L. Carter) Vice-President; George L. Carter (George L. Carter) Vice-President and a Director [fols. 96 & 97] of Carter Coal Company, C. A. Hall (C. A. Hall) Secretary-Treasurer and a Director of Carter Coal Company; John Callahan (John Callahan) Vice-President of Carter Coal Company; Joseph W. Gorman (Joseph W. Gorman) Vice-President of Carter Coal Company; Walter S. Denham (Walter S. Denham) Vice-President of Carter Coal Company, by Karl J. Hardy, Their Attorney. Karl J. Hardy (Karl J. Hardy) Transportation Building, Washington, D. C., Attorney for Defendants, Carter Coal Company, George L. Carter, Vice-President and a Director of said Company, C. A. Hall, Secretary-Treasurer, and a Director of said Company, John Callahan, Vice-President of said Company, Joseph W. Gorman, Vice-President of said Company, and Walter S. Denham, Vice-President of said Company.

Duly sworn to by George L. Carter et al. Jurats omitted in printing.

[fol. 98] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER CONTINUING RULE TO SHOW CAUSE—Filed October 28, 1935

This cause came on to be heard this 28th day of October, 1935, at 1:30 o'clock P. M., upon a rule to show cause issued herein on October 24, 1935, and, thereupon, it is this 28th day of October, 1935,

Ordered that said Rule to Show Cause be, and the same is, hereby continued to 10 o'clock A. M., October 29, 1935.

Jesse C. Adkins, Justice.

[fol. 99] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER OF INJUNCTION PENDENTE LITE AGAINST DEFENDANT CARTER COAL COMPANY AND ITS OFFICERS, AND ORDER DENYING PRELIMINARY INJUNCTION AGAINST GUY T. HELVERING, ET AL.—Filed October 30, 1935

This cause came on to be heard at this term, upon application of plaintiff for preliminary injunction against all the defendants, and also at the same time for trial upon the merits; and it appearing to this Court that the National Bituminous Coal Commission has formulated and promulgated the Bituminous Coal Code and forms of acceptance thereof; that an Acting Deputy District Secretary of the said Commission has been appointed for District No. 7, in which are included the coal mines of the defendant Carter Coal Company, and that the said Secretary has served a copy of the said Code and forms of acceptance thereof upon the said Carter Coal Company together with notice of a meeting on October 30th next at 10 a.m., for the purpose of organizing a District Board for said District No. 7; and it further appearing that the tax provision of the Bituminous Coal Conservation Act of 1935 will become effective upon November 1, 1935, and that it is imminent that the Carter Coal Company will accept and comply with the said Code in order to escape the accrual of the imposition which accrues under the terms of said Act upon all sales of coal made on and after November 1, 1935, by coal operators not assenting to and complying with the said Code;

And it appearing to this Court that the plaintiff may suffer irreparable injury, loss and damage should the defendant Carter Coal Company accept said Code prior to a decision of this cause on its merits; and it appearing that since the case is now on trial the question of the propriety of the issuance of any injunction against the defendants, [fol. 100] Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States, M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland, Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland, John B. Colpoys, individually and as United States Marshal in and for the District of Columbia, Homer S. Cummings, individually and as Attorney General of the United States, Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States, and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, may properly be reserved until the case has been fully heard; and thereupon, upon consideration thereof, it is this 30th day of October, 1935,

Adjud-ed, ordered and decreed that the defendant Carter Coal Company and the defendants George L. Carter, as Vice-President and a Director of Carter Coal Company, C. A. Hall as Secretary-Treasurer and a Director of Carter Coal Company, John Callahan, Joseph W. Gorman and Walter S. Denham as Vice-Presidents of Carter Coal Company and each of them be, and they are hereby, enjoined and restrained, pendente lite, from executing or filing an acceptance of the Bituminous Coal Code pursuant to the Bituminous Coal Conservation Act of 1935; provided, however, that the plaintiff James Walter Carter shall give a bond or understanding, with security to be approved by this Court, in the amount of $15,000.00, to save the said defendants harmless from any loss, costs, damages or liabilities which they may incur through the issue of this preliminary injunction, and it is further

[fol. 101] Adjudged, ordered and decreed that the plaintiff's application for a preliminary injunction against the defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hamp-

ton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, be and it is hereby denied and the rule to show cause thereon be and the same is hereby vacated and discharged.

Jesse C. Adkins, Justice.

ENTRY OF APPEAL

The plaintiff, James Walter Carter, by his attorneys, in open Court takes exception to the entry of so much of the above order as denies relief against the defendants Guy T. Helvering, et al. and directs the giving of a bond as a condition to the relief against the defendants Carter Coal Company, et al. and petitions for and notes an appeal to the United States Court of Appeals for the District of Columbia on this 30th day of October, 1935, which appeal is hereby [fol. 102] granted and noted; whereupon the maximum of an undertaking for costs is hereby fixed in the sum of One Hundred Dollars ($100.00), with leave to deposit the sum of Fifty Dollars ($50.00) with the clerk in lieu thereof.

Jesse C. Adkins, Justice.

MEMORANDUM

October 30, 1935.—Fifty Dollars ($50.00) deposited in cash in lieu of undertaking on appeal.

[fol. 103] IN SUPREME COURT OF DISTRICT OF COLUMBIA.

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed October 30, 1935.

Now comes James Walter Carter by his attorneys and says that in the record, and in the order entered on October

30, 1935, on the applications for preliminary injunctions pendente lite in the above entitled cause, there is error in the following respects:

1. In overruling and denying plaintiff's application for a preliminary injunction pendente lite against all of the defendants herein as prayed;

2. In overruling and denying plaintiff's application for a preliminary injunction pendente lite, as prayed and without bond, restraining and enjoining the defendants, the Carter Coal Company and its officers, George L. Carter as Vice-President and a director of said Company, C. A. Hall as Secretary-Treasurer and a director of said Company, John Callahan, Joseph W. Gorman and Walter S. Denham as Vice Presidents of said Company, from executing and filing an acceptance of the Bituminous Coal Code and from paying any tax attempted to be imposed upon the defendant Carter Coal Company pursuant to the Bituminous Coal Conservation Act of 1935;

3. In overruling and denying plaintiff's application for a preliminary injunction pendente lite restraining and enjoining Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States, his agents, assistants, deputies or employees, from in any manner, directly or indirectly, assessing or collecting from the defendant Carter Coal Company the taxes imposed by said Bituminous Coal Conservation Act of 1935; from causing any Collector or Deputy Collector of Internal Revenue of the United States, or any of said defendant's subordinates or assistants, or any other Government officer, to assess or [fol. 104] collect said taxes from defendant Carter Coal Company; and from issuing any instructions to the Collectors or Deputy Collectors of Internal Revenue or to said defendant's subordinates or assistants, or to any other Government officials, respecting the collection of said taxes from defendant Carter Coal Company;

4. In overruling and denying plaintiff's application for a preliminary injunction pendente lite restraining and enjoining defendants M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland, Clarence C.

Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue in and for Division No. 2 of the Collection District of Maryland, and John B. Colpoys, individually and as United States Marshal in and for the District of Columbia, their agents, assistants, deputies and employees, from collecting, or attempting to collect, directly or indirectly, from Carter Coal Company, any tax or imposition purporting to be levied or assessed against said Company under the Bituminous Coal Conservation Act of 1935 on account of the sale or other disposal of bituminous coal produced by Carter Coal Company as described in this complaint; from seizing any of the property of said Company herein because the said tax has not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceeding against the property of said Company because the said tax has not been paid; from enforcing any of the remedies provided for the collection of internal revenue of the United States against said Company, its property, officers or agents with respect to the said tax;

5. In overruling and denying plaintiff's application for [fol. 105] a preliminary injunction pendente lite restraining and enjoining the defendants Homer S. Cummings, individually and as Attorney General of the United States, Stanley Reed, individually and as Solicitor General and Acting Attorney General of the United States, and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, their agents, assistants, deputies and employees, from attempting to collect by suits or prosecutions, or otherwise, any tax, penalty or fine, mentioned in or imposed by said Act, from defendant Carter Coal Company or any of its officers or Directors.

Wherefore, the appellant prays that for such errors the said order entered on applications for preliminary injunctions pendente lite entered October 30, 1935, in the above-entitled cause be reversed and the cause remanded with directions to enter an order reversing said decision and order of the lower court in said cause and ordering that a preliminary injunction pendente lite issue, as prayed and without bond, against the Carter Coal Company, George L.

Carter as Vice-President and a Director of said Company, C. A. Hall as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter S. Denham as Vice Presidents of said Company, Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States, M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland, Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland, John B. Colpoys, individually and as United States Marshal in and [fol. 106] for the District of Columbia, Homer S. Cummings, individually and as Attorney General of the United States, Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States, and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, and for such other and further relief as may be proper in the premises.

Frederick H. Wood, William D. Whitney, Richard H. Wilmer, Attorneys for Plaintiff-Appellant.

[fol. 107] In Supreme Court of District of Columbia

Praecipe and Designation of Record—Filed October 30, 1935

The Clerk of the Court will please prepare the record on appeal in the above-entitled cause and include therein the following papers and proceedings:

1. Bill of Complaint for Injunction and Petition for Declaratory Judgment filed August 31, 1935.

2. Rule to Show Cause filed August 31, 1935.

3. Motion to Amend Bill of Complaint filed September 3, 1935.

4. Order filed September 3, 1935.

5. Return of Defendants Guy T. Helvering et al., to Rule to Show Cause filed September 16, 1935.

6. Return to Rule to Show Cause filed September 16, 1935.

7. Order Denying Preliminary Injunction filed September 19, 1935.

8. Motion filed September 19, 1935.

9. Order filed September 19, 1935.

10. Entry of Appearances filed September 19, 1935.

11. Stipulation filed September 19, 1935.

12. Stipulation filed September 20, 1935.

13. Joint and Several Answer of Defendants Guy T. Helvering, et al., filed October 2, 1935.

14. Answer of Defendants Carter Coal Company and its Officers to Bill of Complaint filed October 4, 1935.

15. Reply of Plaintiff to Separate Defense as set forth in Part II of Answer of Defendants Guy T. Helvering, et al., filed October 5, 1935.

16. Motion to Advance and Specially Set Case for Hearing filed October 5, 1935.

17. Memorandum of Points and Authorities in Support of Motion to Advance and Set Case Specially for Hearing filed October 5, 1935.

18. Notice to Attorneys for Defendants that Motion and Memorandum of Points and Authorities will be Presented, filed October 5, 1935.

19. Memorandum of Points and Authorities on Behalf [fol. 108] of Defendant Government Officers, Supporting Plaintiff's Motion to Advance but Opposing the Trial Date Requested by Plaintiff, filed October 9, 1935.

20. Order Advancing Case and Setting Specially the Date for Hearing, filed October 9, 1935.

21. Affidavit of James Walter Carter in Support of Preliminary Injunction filed October 24, 1935.

22. Rule to Show Cause filed October 24, 1935.

23. Return to Rule to Show Cause of Defendants Carter Coal Company and its Officers filed October 28, 1935.

24. Return to Rule to Show Cause of Defendants Guy T. Helvering, et al., filed October 28, 1935.

25. Order Continuing Rule to Show Cause, filed October 28, 1935.

26. Order on Application for Preliminary Injunctions, Pendente Lite, filed October 30, 1935.

27. Order and Entry Showing Notation and Allowance of Appeal, filed October 30, 1935.

28. Docket Entry Showing Filing of Appeal Bond.

29. Assignment of Errors, filed October 30, 1935.

30. This Præcipe and Designation of Record, filed October 30, 1935.

Frederick H. Wood, William D. Whitney, Richard H. Wilmer, Attorneys for Appellant, James Walter Carter.

[fol. 109] Clerk's Certificates to foregoing transcript omitted in printing.

[fols. 110 & 111] [File endorsement omitted.]

Endorsed on cover: File No. 40,117. District of Columbia, U. S. Court of Appeals. Term No. 563. James Walter Carter, Petitioner, vs. Carter Coal Company, et al. Petition for a writ of certiorari and exhibit thereto. Filed October 31, 1935. Term No. 563 O.T. 1935.

[fol. 101] IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDA

October 31, 1935.—Injunction undertaking ($15000.00) of James Walter Carter approved and filed. Deposit of $15000.00 to be made with Clerk in lieu of surety. Deposit by James Watler Carter (in Registry $15000.00).

November 15, 1935.—$15000.00 deposited in Registry by J. Walter Carter.

[fol. 102] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER APPROVING FURTHER SECURITY FOR UNDERTAKING—Filed November 14, 1935

* * * * * * *

Upon motion of the attorney for the defendants, Carter Coal Company and its officers and directors, the plaintiff James Walter Carter hereby deposits the sum of $15,000 with the Clerk to be held in the registry of this Court, which deposit is hereby approved as further security for the undertaking heretofore filed herein on the 31st day of October, 1935.

Jesse C. Adkins, Justice.

Dated November 14, 1935.

[fol. 103] IN SUPREME COURT OF DISTRICT OF COLUMBIA

STIPULATION AS TO HEARING, ETC.—Filed November 20, 1935

* * * * * * *

It is hereby stipulated and agreed by and between the parties hereto that

(1) all of the parties hereto shall file all of their proposed Findings of Fact and Conclusions of Law on or before November 26, 1935 at 10 o'clock in the forenoon of that day;

(2) that the Statement of Evidence filed by the plaintiff herein on November 16, 1935, shall be submitted for final settlement on or before December 3, 1935, and that any modifications thereof or amendments thereto proposed by any of the defendants herein shall be submitted to the [fol. 104] plaintiff on or before Dec. 2nd, 1935;

(3) that oral argument in respect of Findings of Fact and Conclusions of Law, and in respect of submission hereof for final decree, shall be had on November 26, 1935, at 10 o'clock in the forenoon of that day.

William D. Whitney, Attorney for Plaintiff James Walter Carter. Karl J. Hardy, Attorney for Defendants Carter Coal Company, et al. John Dickinson, Assistant Attorney General of the United States, Attorney for Defendants Guy T. Helvering, et al.

Washington, D. C., November 20, 1935.

[fol. 105] In Supreme Court of District of Columbia

Amendments to Bill of Complaint—Filed December 10, 1935

* * * * * * *

On motion by the plaintiff in open court on the 26th day of November, 1935, it was ordered that the bill of complaint herein be amended by adding the following at the end of paragraph 17th thereof:

"(5) The said Act is invalid in that it attempts an unlawful delegation of the legislative power of the United States in violation of Article I, Sec. 1 of the Constitution of the United States; in that it attempts unlawfully to vest executive and administrative power of the United States in violation of Article II, Sec. 2, paragraph 2 of the Constitution; and in that the attempted delegation and investment of such power in private and interested parties is arbitrary and discriminatory and violative of rights guaranteed to the plaintiff and to the Carter Coal Company by

the Fifth Amendment to the Constitution of the United States.

"(6) The penalty, imposed by the Act in the guise of a tax upon producers not accepting and complying with the Code, is violative of the Fifth Amendment if construed to be applicable for the period of the pendency of this suit, and, if so construed, is to that extent unconstitutional and void."

In open court on November 27, 1935, on motion of plaintiff, and the defendants consenting thereto, it was ordered that the bill of complaint herein be amended by adding to paragraph 17 thereof the following numbered sub-paragraphs:

"(2a) Section 4 of the said Act, and the Code formulated [fol. 106] and promulgated thereunder, are unconstitutional and invalid in their entirety as applied to the defendant Carter Coal Company since they constitute regulations of its intrastate activities, the regulation of which does not constitute a regulation of commerce among the several states, or

"(2b) The price-fixing provisions of said Section 4 and said Code are invalid and unconstitutional as applied to the defendant Carter Coal Company since such provisions do not constitute regulations of commerce among the several states, and

"(2c) The labor relations provisions of said Section 4 and of said Code, and each and all of them jointly and severally, including the provisions regulating the wages and hours of mine workers, are each and all, jointly and severally, unconstitutional and invalid as not constituting regulation of commerce among the several states."

and it was further ordered that paragraph 26 of the said bill be amended by adding the following to the end of the third sentence therein:

"and will obligate itself to accept such maximum hours and minimum wages for all its mine employees as may be established by the persons and in the manner prescribed in the statute and in the Code, regardless whether the hours

and wages so established are satisfactory to the Company or to its employees or any of them, or whether they will permit the Company, in the judgment of its management, profitably to operate its business, and that labor costs constitute so large a part of the cost of producing coal that the surrender of the rights and duties of the management of the Company in that respect will be of great injury to it."

Jesse C. Adkins, Justice.

We consent: F. B. Critchlow, Special Assistant to the Attorney General, Counsel for Government Officer Defendants. Reynolds Robertson, Counsel for Plaintiff.

[fol. 107] In Supreme Court of District of Columbia

Order Granting Amendments to Answer—Filed December 10, 1935

* * * * * * *

On motion of counsel for the defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland, Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia; counsel for the plaintiff, James Walter Carter, and for the defendants Carter Coal Company, George L. Carter, as Vice President and a Director of said Company, C. A. Hall, as Secretary-Treasurer and a Director of said Company, John [fol. 108] Callahan, Joseph W. Gorman and Walter S. Denham, as Vice Presidents of said Company, consenting, it is by the Court this — day of December, 1935,

Ordered that the answer of the defendants Guy T. Helvering, et al., be amended as follows:

(1) By adding at the end of subsection (a) in the fourth paragraph of Part II of the answer the following words: "and to substantial diversions and dislocations of such coal shipments";

(2) By adding after the word "burden" and before the word "and" in the third line of subsection (c) of the fourth paragraph of Part II of the answer the following words: "divert, dislocate,";

(3) By adding in the fourth line of subsection (c) of the fourth paragraph of Part II of the answer at the end of the sentence concluding "bituminous coal" and before the sentence beginning "Such burdens" the following words: "and to divert the flow of interstate commerce in bituminous coal to persons employing such methods.";

(4) By adding in the fourth line of subsection (c) of the fourth paragraph of Part II of the answer after the word "restraints" and before the word "and" the words: ", diversions, dislocations".

With the foregoing amendments contained in paragraphs (1), (2), (3) and (4) above, the fourth paragraph of Part II of the answer of the defendants will read as follows:

"In view of the great present importance of bituminous [fol. 109] coal as a source of energy for industrial and domestic purposes, and in view of the necessity of transporting it across State lines to reach the great majority of the users, it is of particular importance to the national public welfare that the distribution and marketing of bituminous coal in interstate commerce be not subjected to interruptions, dislocations, burdens, or restraints. For many years the distribution and marketing of bituminous coal in interstate commerce has been subject (a) to sudden unforeseeable, recurrent and prolonged interruptions and stoppages in the shipment of such coal from the producing areas to the consuming markets and to substantial diversions and dislocations of such coal shipments; (b) to sudden, recurrent and extremely wide fluctuations in the price of such coal to the consuming public, resulting in hardship and inconvenience to the consuming public in

other States than the State of production, and tending directly and substantially to restrict and control the movement of coal in interstate commerce; (c) to unfair and demoralized methods of competition throughout the industry which operate directly and substantially to burden, divert, dislocate, and restrain interstate commerce in bituminous coal and to divert the flow of interstate commerce in bituminous coal to persons employing such methods. Such burdens, restraints, diversions, dislocations and interruptions have operated so as to affect seriously and injuriously a multitude of consumers of bituminous coal throughout the country, to cause a substantial waste of the coal resources of the nation, to bring about the bankruptcy of many coal producers and to result in widespread unemployment. Such conditions have resulted in serious and widespread reigns of disorder and violence requiring resort on the part of public authorities and of the private parties directly concerned therewith to the State and Federal courts of law and equity and necessitating the use of State militia and of Federal troops."

[fol. 110] (5) By adding at the end of the list of hearings contained in Part II of the answer the following hearings:

Hearings before the House Committee on Mines and Mining in 1914 entitled "Conditions in the Coal Mines of Colorado, Pursuant to House Resolution No. 387",

Hearings before a subcommittee of the Senate Committee on Education and Labor, 63d Congress, 1st Session, entitled "Conditions in the Paint Creek District of West Virginia",

Hearings before the Senate Committee on Manufactures, 66th Congress, 3d Session, entitled "Publication of Production and Profits in Coal",

(6) By inserting after the word "interruptions" and before the words "to such" in the fourth line of the sixth paragraph of Part II of the answer the following words: ", dislocations and diversions";

(7) By inserting after the word "interruptions" and before the words "to interstate" in the ninth line from the bottom of the sixth paragraph of Part II of the answer the following words: ", dislocations and diversions".

With the foregoing amendments contained in paragraphs (6) and (7) above, the sixth paragraph of Part II of the answer of the defendants will read as follows:

"From the facts disclosed in and by the aforesaid legislative investigations, and otherwise, it was and is made evident, and these defendants aver the facts to be, that the aforesaid burdens and restraints upon and interruptions, dislocations and diversions to such commerce in bituminous coal are presently, primarily and directly due to and caused [fol. 111] and occasioned by the existence of an abnormal and destructive competitive rivalry for markets between the said several producing areas and between the producing units therein contained; that such unbridled competition has resulted in a reduction of the average mine realization price of bituminous coal to a level frequently below the average cost of production of such coal; that over 60 percent of the cost of producing bituminous coal in the United States is attributable to the cost of labor going directly into its production and that such labor cost is the only cost element that is subject to appreciable adjustment; that as a direct result of such competition wages in said industry have been progressively forced down to a point below subsistence levels; that numerous controversies resulting in strikes and lockouts and in the interruption, cessation and dislocation of production and distribution have resulted directly from such price and wage reductions and from the refusal of employers to bargain collectively relative thereto and from various unfair labor practices; that to remove or control the aforesaid direct and substantial burdens upon and interruptions, dislocations and diversions to interstate commerce in bituminous coal it is necessary that competition between the various producing areas aforesaid in the consuming markets of the several states be regulated by the elimination of unfair competitive marketing practices by the fixing between fair and reasonable limits of the price at which such coal may be distributed in such consuming markets and by stabilizing and equalizing as between producing areas, and between the producing units therein contained, the wages and hours of labor of [fol. 112] employees, and by otherwise eliminating the causes of strikes and lockouts."

(8) Paragraph 17 of said answer is amended to read as follows:

"These defendants show that each and every charge or allegation contained in Paragraph 17 of plaintiff's bill of complaint, as amended, is a conclusion of law and that they are not required to make answer thereto. Defendants nevertheless deny each and every charge or allegation contained therein, and show that the said Bituminous Coal Conservation Act of 1935 expressly provides that acceptance of the code by the Carter Company will not prejudice the right of said company to contest the constitutionality or validity of any code provision, and that full, complete and adequate judicial and administrative remedies are provided in said Act for all of the conjectural injuries referred to by plaintiff in said bill."

(9) With respect to the amendment to paragraph 26 of the bill of complaint, paragraph 26 of the answer is amended by adding at the end thereof the following:

"Answering the allegations contained in the amendment to plaintiff's bill of complaint with reference to the acceptance by the Carter Coal Company of maximum hours and minimum wages for its mine employees, these defendants admit that labor costs constitute a large part of the cost of producing bituminous coal. They deny the remaining allegations contained in said amendment except in so far as said remaining allegations constitute conclusions of law."

Jesse C. Adkins, Justice.

We consent: F. B. Critchlow, Special Asst. to Attorney General, Counsel for Defendant Government Officers; Reynolds Robertson, Counsel for Plaintiff.

[fol. 113] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER GRANTING AMENDMENTS TO ANSWER—Filed December 10, 1935

* * * * * * *

Upon motion of counsel for the defendants Carter Coal Company, George L. Carter, as Vice President and a Di-

rector of said Company, C. A. Hall, as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter S. Denham, as Vice Presidents of said Company, counsel for the plaintiff, James Walter Carter, and for the defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States, M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland, Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland, John B. Colpoys, individually and as United States Marshal in and for the District of Columbia, Homer S. Cummings, individually and as Attorney General of the United States, Stanley Reed, individually and as Solicitor General of the United States, and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, consenting, it is by the [fol. 114] Court this 10th day of December, 1935,

Ordered that the answer of the defendants Carter Coal Company, George L. Carter, as Vice President and a Director of said Company, C. A. Hall, as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter S. Denham, as Vi Presidents of said Company, be amended as follows:

(1) With respect to plaintiff's amendments to paragraph 17 of the bill of complaint, the defendants adopt paragraph 17 of their answer heretofore filed herein;

(2) With respect to the plaintiff's amendment to paragraph 26 of the bill of complaint, the defendants adopt paragraph 26 of their answer heretofore filed herein.

Jesse C. Adkins, Justice.

We consent: F. B. Critchlow, Special Assistant to the Attorney General, Counsel for defendant Government officers. Reynolds Robertson, Counsel for plaintiff.

IN THE

SUPREME COURT of the District of Columbia

HOLDING AN EQUITY COURT

JAMES WALTER CARTER,
Plaintiff,
v.
CARTER COAL COMPANY, *et al.*,
Defendants.

In Equity
No. 59374

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the above-entitled cause heard before the undersigned, Associate Justice of the Supreme Court of the District of Columbia sitting in Equity Division No. 2, the Court, from the pleadings and exhibits filed and from the hearings had and the evidence taken before it, and the matters of which it may take judicial notice, makes the following findings of fact and reaches the following conclusions of law:

FINDINGS OF FACT

A. Evidentiary Facts

I. Parties

1. The plaintiff in this suit is James Walter Carter, a citizen and resident of the State of Maryland and of the United States. He is now, and has been since prior to the filing of the bill of complaint herein, the President, a Director and a minority shareholder

of the defendant corporation, Carter Coal Company (R. 2; Tr. 161).

2. The defendant Carter Coal Company is a corporation organized and existing since 1918 under the laws of the State of Delaware with its principal office and place of business located in Washington, District of Columbia, and is a citizen of the United States and of the State of Delaware (R. 2; Tr. 161). The defendant George L. Carter is a citizen and a resident of the District of Columbia and is a Vice-President and Director of Carter Coal Company. The defendant C. A. Hall is an officer and Director of the defendant Carter Coal Company. The defendant John Callahan is a citizen and resident of the State of Maine; the defendant Joseph W. Gorman is a citizen and resident of the State of Massachusetts; and the defendant Walter S. Denham is a citizen and resident of the State of Kentucky. The defendants John Callahan, Joseph W. Gorman and Walter S. Denham are Vice-Presidents of Carter Coal Company (R. 3; Tr. 162). These defendants are hereinafter referred to for convenience as "the Carter Company defendants."

3. The defendant Guy T. Helvering is the Commissioner of Internal Revenue of the United States; defendant M. Hampton Magruder is the Collector of Internal Revenue of the United States for the Collection District of Maryland; defendant Clarence C. Keiser is the Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; defendant John B. Colpoys is United States Marshal in and for the District of Columbia; defendant Homer S. Cummings is Attor-

ney General of the United States; defendant Stanley Reed is Solicitor General of the United States and in the absence of the Attorney General is the Acting Attorney General of the United States; and defendant Leslie C. Garnett is the United States Attorney in and for the District of Columbia. These defendants are hereinafter referred to for convenience as "the Government officer defendants."

4. All of the defendants have entered appearances in this Court in this cause both in their individual and official capacities, and this Court has jurisdiction over the persons of each and all of the defendants.

II. The Statute, the Code, the Organization of the District Board, and the Tax Regulations

5. This suit arises under the Constitution and Laws of the United States and involves the validity, construction, application and enforcement of the Act of Congress approved August 30, 1935, known as the Bituminous Coal Conservation Act of 1935, hereinafter referred to as "the Act," and of the Bituminous Coal Code formulated and promulgated thereunder, hereinafter referred to as "the Code."

6. The members of the Bituminous Coal Commission (hereinafter called the "Commission") were appointed by the President on September 20, 1935, and said Commission held its first meeting on September 28, 1935, all members thereof having duly taken oath of office as such members (R. 52).

7. On October 9, 1935, the Commission formulated and promulgated the Bituminous Coal Code, which appears in the Record at R. 57-76 together

with form for acceptance thereof, which appears in the Record at R. 76-77 (Pl. Ex. 15, 16; Tr. 256).

8. On the same day the Commission issued an order providing for the organization of district boards of coal producers as provided for in the Act and in the Code, which order appointed acting deputy district secretaries (Pl. Ex. 17; Tr. 256).

9. On October 17, 1935, P. M. Snyder, the acting deputy district secretary of the Commission appointed in the order aforesaid for District No. 7, issued and delivered to the defendant Company a notice calling a meeting of the producers of bituminous coal in District No. 7 for the purpose of organizing a district board for such district, such meeting to be held October 30, 1935, at Beckley, West Virginia. A copy of the Bituminous Coal Code and form for acceptance thereof were served upon the Company at that time. The Company has not joined the Code and no representative thereof attended the meeting of such district board.

10. At the said meeting, such district board was organized and the members thereof are as follows:

J. W. Bell, General Manager,
Imperial Smokeless Coal Co.,
Quinwood, West Virginia.

William Blizzard,
United Mine Workers of America,
Charleston, West Virginia.

R. E. Brockman, General Manager,
Atlantic Smokeless Coal Co.,
Asco, West Virginia.

W. G. Caperton, Vice-President,
New River Coal Company,
Charleston, West Virginia.

O. M. Deyerle, President,
Flat Top Fuel Company,
Bluefield, West Virginia.

H. D. Everett, President,
Smokeless Fuel Company,
Charleston, West Virginia.

W. A. Richards, President,
Sovereign Pocahontas Co.,
Bluefield, West Virginia.

S. A. Scott, President,
New River Company,
Mt. Hope, West Virginia.

P. M. Snyder, Vice-President,
Koppers Coal & Transportation Co.,
Mt. Hope, West Virginia.

John L. Steinbugler, President,
William C. Atwater Co., Inc.,
New York, N. Y.

W. P. Tams, Jr., President,
Gulf Smokeless Coal Company,
Tams, West Virginia.

Such persons are either active competitors of the defendant Company in the said District No. 7 (wherein the principal mines of the defendant Company are located) (Tr. 257; Pl. Ex. 18) or are representatives of such competitors, with the exception of William Blizzard, who is a labor representative (R. 52, 53; Def. Ex. 45).

11. On November 11, 1935, the National Bituminous Coal Commission issued the following statement: "Latest estimates based upon figures by Acting

Deputy District Secretary to the National Bituminous Coal Commission show that producers representing approximately 212,252,000 tons production during 1934 have given assent to the Bituminous Coal Code. That figure represents an increase of more than 12,250,000 tons over the total tonnage reported on Friday last. Additional acceptances are coming in daily." (Tr. 1588-1589.) The national production of bituminous coal for 1934 was 358,395,000 tons (Pltfs. Ex. 19 and 21).

12. General Order No. 6 of the National Bituminous Coal Commission, dated November 7, 1935, provides that the reporting of spot orders to district boards and other agencies and the filing with them of copies of contracts, invoices, credit memoranda and other information shall be deferred until the Commission shall have prescribed and promulgated rules and regulations to effectuate the requirements that such records shall be held as the confidential records of the filing producer (Def. Ex. 44).

13. At a meeting of the District Board of District No. 7 held on November 5, 1935 it was resolved that there be incorporated in the by-laws of the board a provision for the establishment of a statistical bureau to be under the management of a director, who shall have no financial interest in the industry and shall not be in the employ of any coal producer, and that the reports of spot orders, copies of contracts, invoices, credit memoranda and other information shall be filed by code members with said statistical bureau, said records not to be available for inspection by the District Board nor any member thereof. On November 14, 1935, the said resolution and by-

law provision were approved by the Bituminous Coal Commission (Def. Ex. 45).

14. On November 1, 1935 the Commissioner of Internal Revenue issued regulations, approved October 30, 1935, by the Secretary of the Treasury, relating to the tax imposed by Sec. 3 of the Act. Such regulations (T. D. 4596) appear in the Record as Pl. Ex. 89. Art. 52 of such regulations requires that producers subject to taxes under the Act shall file a return for each calendar month "with the Collector for the district in which is situated the principal place of business of the person filing the return, on or before the first business day of the second succeeding month. For example, the return for the month of November, 1935 is due on or before January 2, 1936." Art. 53 requires that "the amount of tax shown on the return to be due shall be paid to the Collector at the time fixed for filing the return, without assesment by the Commissioner or notice from the Collector." The principal place of business of the Carter Coal Company, is in Washington, District of Columbia, which is situated within the collection district of Maryland.

III. The Controversy

15. There exists a genuine dispute between the plaintiff and the controlling stockholders of the Company. The view of said controlling stockholders and of a majority of the board of directors is that the statute is unconstitutional and is economically unsound, and that it would adversely affect the business of the Company and the interest of its shareholders for the Company to accept and comply with the Code, but that nevertheless the Company must

accept the Code because of the tax on its gross sales applicable upon its failure to accept the same which the majority are of the opinion would result in serious damage to the Company and might result in its bankruptcy. It was accordingly resolved at meetings of the directors and stockholders that the Company should join the Code, and the proper officers of the Company were authorized and directed to take action which might be necessary in the premises (Tr. 166; Pl. Ex. 6). The plaintiff seriously endeavored to persuade the controlling stockholders and a majority of the board of directors to contest the validity of the Act and to refuse to join the Code, and he did all that a reasonable and prudent man, under the circumstances, should have done to secure action favorable to his views by the board, by the stockholders and by the corporation (Tr. 194, 195). This proceeding is brought in good faith (Tr. 161; 169).

16. There is a real and substantial adverse controversy herein. The matter in controversy in this suit exceeds the sum or value of $3,000, exclusive of interests and costs (Tr. 167); and this suit is not a collusive one to confer upon a court of the United States jurisdiction of a case over which it otherwise would not have cognizance.

IV. Organization, Business and History of Carter Coal Company

17. The defendant Carter Coal Company is incorporated under the laws of the State of Delaware which require that its business "shall be managed by a Board of Directors." (Tr. 162, 237; Pl. Ex. 8) (Laws of Delaware, 1929, Chapter 135, Section 4.)

In conformity therewith the By-laws of the defendant Carter Coal Company provide that "The property, affairs and business of the Corporation shall be managed by the Board of Directors," said Board to consist of three directors, who shall act by majority vote (By-laws, Art. V, Secs. 1, 2, 12) (Tr. 163, Pl. Ex. 4).

18. The defendant Carter Coal Company is engaged in the business of mining, producing and selling bituminous coal at its mines located in McDowell County, State of West Virginia, and in Tazewell County, State of Virginia, in the so-called Smokeless field (whose limits are generally coterminous with those of District 7 under the Bituminous Coal Conservation Act of 1935). It also owns mines in Bell and Knox Counties, State of Kentucky, but does not currently operate them (Tr. 164).

19. In the conduct of its said business of producing and selling bituminous coal within the States of Virginia and West Virginia the defendant Carter Coal Company is subject to the regulation of statutes of the said States which provide regulations in respect of the health, safety and welfare of its employees and of the public. Such statutes, supervised by Departments, Commissions and Bureaus, constitute comprehensive codes making detailed regulations for the protection and promotion of the health, safety and welfare of the public and of said defendant's employees in the operation of its said business, including the qualifications of employees and of places where they shall be permitted to work in mines (Virginia Code of 1930, Chapter 76, Sections 1835 to 1887, [fol. 4] inclusive; Code of West Virginia, 1931, Chapter 22, Articles 1 and 2); provisions regulating the methods

of weighing and measuring coal and the payment of employees therefor, including the employment of weighmen and checkweighmen (Code of West Virginia, 1931, Chapter 22, Article 2, Sections 73-78); provisions requiring the payment of compensation to injured workmen and provision for their vocational rehabilitation and education (Virginia, Code of 1930, Chapters 76 (A) and 76 (B), Sections 1887 (1) to 1887 (85), inclusive; Code of West Virginia, 1931, Chapter 23, Article I to V, inclusive). There are also provisions forbidding the employment of child labor (West Virginia Code, Chapter 21, Article VI), and statutes prohibiting child or female labor (Virginia Code, Chapter 76, Sec. 1871. (R. 4-5, Pl. Exs. 9, 10). There is no evidence that the defendant Carter Coal Company has violated any of these statutes of the States of West Virginia and Virginia at any time.

20. In the carrying on of the said business of producing and selling bituminous coal within the States aforesaid, the said defendant is regularly subjected to the payment of taxes to the said States and to subdivisions thereof. In the calendar year 1934 said defendant paid to the State of West Virginia in taxes: $35,825.75 sales tax upon its coal and other merchandise; $55,673.43 property tax; $547.90 license tax; a total of $92,047.08; and in addition paid sundry license taxes in undisclosed amounts. The same year it paid to the State of Virginia property taxes in the amount of $2,327.04, and franchise tax in the amount of $25; to the State of Kentucky property taxes in the amount of $3,133.90; to the State of Delaware fees and franchise tax in the amount of $222.83; to the

State of New York franchise tax in the amount of $25; to the District of Columbia property tax in the amount of $259.14; and to the State of North Carolina property tax in the amount of $8.08 (Tr. 238; Pl. Ex. 11).

21. In the calendar year 1934 said defendant paid $78,000 to the State of West Virginia in respect of workmen's compensation (Tr. 240).

22. Substantially all of the coal mined by Carter Coal Company is sold f.o.b. mines, and substantially all of it is transported into states other than those in which produced to fill orders obtained by the Carter Coal Company from purchasers in such other states (Tr. 331). Total production of the defendant Carter Coal Company for 1934 was 2,125,046 tons, of which approximately 50,000 tons was sold into the state in which it was mined (Tr. 236-239).

23. Approximately sixty per cent. of the coal produced by the Carter Coal Company moves into the "inland western market" (comprising Illinois, Indiana, Ohio, Wisconsin and Michigan) and to the ports of the Great Lakes. Approximately 20% moves to tidewater ports on the Atlantic Seaboard, at which points it is dumped into vessels for transshipment. Approximately 20% moves into the southeastern states and into the north Atlantic states including Virginia, West Virginia, North and South Carolina, Pennsylvania, New Jersey, Delaware, Maryland and the District of Columbia (Tr. 239).

24. Carter Coal Company maintains sales offices in Washington, D. C.; New York, N. Y.; Cleveland and Cincinnati, Ohio; Chicago, Illinois; Norfolk, Virginia; and Detroit, Michigan (Tr. 329-330);

and sells coal to a subsidiary company with headquarters in Boston, Massachusetts (Tr. 332).

25. About 90% of the coal produced by Carter Coal Company comes from two mines at each of which there are substantial preparation plants where the coal is usually screened into a number of different sizes and where it is in many cases treated with chemical preparations to make it dustless and more attractive to buyers (Tr. 249-250). At two of its mines the Company has a storage yard, at each of which it can store between 50,000 and 100,000 tons of coal (Tr. 293).

26. A substantial portion of the production of the mines of Carter Coal Company is applied upon existing contracts calling for the delivery of coal over a period of months, but it frequently occurs that coal is produced and loaded into railroad cars before an order for the sale thereof has been obtained (Tr. 331).

27. Certain kinds and sizes of coal, i. e., slack or fine coal, are often sold by the Carter Coal Company at less than the average cost per ton of producing all kinds and sizes of coal. Other kinds and sizes of coal, i. e., the prepared sizes of lump, egg, stove, nut, and pea, are generally sold at more than the average cost of producing all kinds and sizes of coal (Tr. 355-356).

28. Carter Coal Company employs approximately 3,000 persons who have an average of about 3 dependents each. (Tr. 251). Living conditions, housing, educational, religious and recreational facilities, medical attention and health conditions are of a high standard in the mining villages at the Carter Coal Company mines, and likewise at the mines

of other producers in the vicinity (Tr. 1594-1597, 1599-1600).

29. Carter Coal Company does not now require and in so far as the plaintiff is advised never has required its employees as a condition of employment to agree that they will not join a labor organization (Tr. 1597). It does not require its employees to live in houses belonging to the Company or to trade at the stores maintained by it.

30. Prices at the stores maintained by Carter Coal Company, trading at which is not compulsory, are as low as or lower than prices obtaining in chain stores, which exist in the vicinity. The merchandise as to volume and variety is as good as or better than the average found in independent stores in the general community. It is customary for the Company to extend credit to its employees at its stores as a matter of convenience to its employees. During the depression period when work was not available to employees the Company, in common with other companies in the southern fields of West Virginia extended credit to those employees, the amount of credit depending upon the resources of the companies involved and the length of service of the employees. (Tr. 1600-1601.)

31. Average annual earnings of all employees of Carter Coal Company since 1922 (other than those on salaries) have been approximately as follows: 10 months in 1922, $1,043; 1923, $1,457; 1924, $1,326; 1925, $1,349; 1926, $1,519; 1927, $1,415; 1928, $1,292; 1929, $1,359; 1930, $1,193; 1932, $569; 1933, $833; 1934, $1,048 (Pl. Ex. 88). It has been the experience of the Company that the mine workers generally do not work the full number of

days available to them (Tr. 1613-1616). The average hourly rates paid common labor by the Company during the period 1926 to 1934 inclusive were at all times higher than the average hourly wage rates paid common labor in other industries in the combined South Atlantic States (Delaware, Maryland, District of Columbia, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida). (Plaintiff's Exhibit 48, Tr. 324.) In July 1, 1932, and July 1, 1933 (at which time wages generally, including wages of the Carter Coal Company were the lowest in the 10-year period 1926-1935) the comparison with other industries in West Virginia was as follows:

Date	Carter Coal Co. hourly rate paid common labor[a]	Carter Coal Co. hourly rate paid inside common labor[a]	Average hourly entrance rates common labor in other industries in West Virginia[b]
July 1, 1932	30c	35c	31.9c
July 1, 1933	28c	32c	35.1c

[a] Plaintiff's Exhibit 50.
[b] Defendants' Exhibit 53.

From 1926-1931, the Carter Coal Co. hourly wage rates were 40c for common labor and 45c for inside common labor; in 1934-1935 they were 51.4c for common labor and 62.3c for inside common labor. (Pl. Ex. 50.) During the period 1926 to 1931 wage rates for common labor in West Virginia were also comparably higher than they were on July 1, 1932, and July 1, 1933.

32. Carter Coal Company has been in business since 1912, and between that date and this, the total number of strikes at the mines of the Company has been two. One such strike occurred in October,

1933, at the mines in West Virginia and lasted at two of the mines a maximum of two weeks, and at the other two about two days. The Company was told unofficially that the cessation of work was in protest of the action of representatives of the miners in signing a working agreement with representatives of operators in the Appalachian Region, pursuant to the provisions of the National Recovery Act Coal Code for the Bituminous Coal Industry (Tr. 320, 321). The other strike lasted about 7 working days and occurred at the expiration of the working agreement between the miners and representatives of the operators in September, 1935 (Tr. 321).

V. The Increasing Business of the Carter Coal Company, the Value to it of the Rights of Management, and its Contract Rights.

33. Prior to February, 1922, the Carter Coal Company was controlled and managed by the plaintiff's father, George L. Carter. At that date George L. Carter sold all of the voting stock of the company to Consolidation Coal Company, and the Consolidation Coal Company agreed to purchase from George L. Carter over a period of time the preferred stock of the Carter Coal Company. The Consolidation Coal Company then assumed the management of the Carter Coal Company and during the following years lent it substantial sums of money to make improvements, for working capital and for other purposes. The Consolidation Coal Company went into receivership in 1932 at which time the Carter Coal Company was indebted to Consolidation Coal Company, as shown by the books of that company, in an amount in excess of $10,000,000.

34. A transaction was then consummated between the receivers of Consolidation Coal Company and George L. Carter and members of his family, pursuant to which the Carter Coal Company was recapitalized. The indebtedness to the Consolidation Coal Company, as shown by the books of that company, and the Company's bonded indebtedness was cancelled in exchange for the issuance to the Consolidation Coal Company of 30,000 shares of voting stock of the Carter Coal Company. These voting shares were purchased by plaintiff. The agreement of the Consolidation Company to purchase the preferred shares was cancelled. This arrangement was consummated in March, 1933. (Tr. 1617-1620.)

35. The income account statement of the Company shows a net loss for the period 1924 through 1933 inclusive, the minimum annual loss during said period being the sum of $209,560 for the year 1927. There was a profit of $323,988 (after deducting Federal Income taxes) for the year 1934 (Def. Ex. 47). During the period 1924-1932 (while under the Consolidation management) annual interest charges ran from a low of $443,991 in 1924 to a high of $851,980 in 1932. For the first 2½ months of 1933 (under Consolidation management) interest charges were $179,125. For the next 9½ months (under Carter management), during which period the Company operated at a loss of $188,322, interest charges were $8,596, and interest charges for 1934 were $24,981. During the present year (1935) the Company is operating at a profit but the returns are less than they were in 1934 (Tr. 1555, 1557, 1558).

36. The week by week production record of Carter Coal Company has increased for the past three coal years (April-March), moving from a high of approximately 49,000 tons during the coal year April, 1933 to March, 1934 to a high of approximately 52,000 tons during the coal year April, 1934 to March, 1935, and to a high of 60,000 tons during the current coal year commencing in April 1935 (Tr. 315; Pl. Ex. 44).

37. Carter Coal Company has been doing business since 1912; has a valuable good will and established registered trade names for its products (Tr. 251-253); and presently has customers with whom it has been dealing with regularity. The good will and going concern value of the Company are of substantial value (Tr. 251-253).

38. Labor costs and prices are among the most important elements requiring business skill and judgment in the successful operation and management of a coal producing and selling corporation (R. 55). More than 60% of the production costs of Carter Coal Company are attributable to mine labor costs, and the right and duty to negotiate and contract with its miners in respect of the establishment of hours and wages is an important function of management of the Company (Tr. 319).

39. Since May 27, 1935, Carter Coal Company has entered into contracts for the sale of coal for terms of one year or longer covering an aggregate of 850,750 net tons at an aggregate price f.o.b. mines of $1,004,765 the average price per ton being $1.18. Of this amount approximately 230,000 net tons have been contracted for since August 30, 1935, which contracts

all provide for delivery for a period longer than 30 days from the date of the contract (Def. Ex. 48). Many of these contracts are at prices below those which were in effect under the NRA Code. Substantially all of the coal to be delivered on said contracts is slack coal and the prices at which the coal has been contracted for are, as is customary, at less than the Company's estimated average costs of production of all grades of coal (Tr. 315-317, 355-356).

VI. The Tax Applicable to Operators Not Accepting and Complying with the Code.

40. In the calendar year 1934, Carter Coal Company sold approximately 2,126,046 tons of bituminous coal, obtaining an aggregate sales price at the mine of $3,918,266, upon which it realized a net profit in the operation of its business of $323,998. Had a tax of 15% on the sales price at the mine been imposed, the tax payable would have been $587,740, and had a tax of 13½% been imposed it would have amounted to $528,966. The imposition of either of such tax rates would have completely wiped out all net profit from the operation of the business of the Company, the 15% tax creating a net loss of $263,752 and the 13½% tax creating a net loss of $204,968. Neither in the present year nor at any time during the past 8 years have the net profits of Carter Coal Company equalled 15% or 13½% of the total sales price received by the Company at the mine (R. 12; Tr. 251; Pl. Ex. 12; Def. Ex. 47).

41. Bituminous coal producing companies generally have not earned 13½% of their mine realization price as a net profit at any time during the last

eight or nine years (Tr. 861-875; Def. Exs. 6, 6-A, 49, 49-A). In the view of those familiar with the bituminous coal industry the tax provisions of Section 3 will in fact induce those bituminous coal producing companies who are opposed to the Code to accept and comply with the Code (Tr. 700, 702; 861-875; 943) and this is also the view of the officers and directors charged with the management of the Carter Coal Company and of all its voting shareholders (R. 8, 9, 12, 41, 251-255; Pl. Ex. 12). The weight of the tax is such, compared with the earnings of the Company, that it could not long continue in business and pay the said 13½% tax (R. 8, 9, 12, 41; Tr. 251-255; Pl. Ex. 12; Def. Ex. 47).

VII. The Importance of the Bituminous Coal Industry.

42. Bituminous coal is, and probably will continue to be, the principal source of energy in the United States. (Tr. 382, 393.) Nearly one-half of the mechanical energy is at present derived from bituminous coal. In 1934, water power supplied 9.3 per cent, natural gas 8.7 per cent, oil 28 per cent (including energy used by automobiles), anthracite coal 7.7 per cent, and bituminous coal 46.3 per cent of the total energy consumed in the United States. (Tr. 382). Bituminous coal likewise furnishes an important part of the fuel used for household heating. In 1929 bituminous coal supplied approximately 75 per cent of all primary energy used in the manufacturing industries of the country, in 1934 it supplied approximately 75 per cent of all fuel used by public utilities, and in 1933 it supplied approximately 83 per cent of all energy used by railroads for locomo-

tive power. (Tr. 383.) It is estimated by scientists that water power can never furnish a major portion of the energy requirements of the United States. The known supplies of oil and gas are limited, so that, unless new sources of energy are discovered or developed, coal will continue to be the primary source of energy. (Tr. 382-393, 497-501.)

43. Bituminous coal is consumed in every state of the United States in generating energy for the production of light, heat and power, and its use for such purposes is indispensable to the industrial and economic life and to the health and comfort, of the inhabitants of the United States and is vital to the public welfare. In view of the present importance of bituminous coal as a source of energy it is of great importance to the public welfare that the distribution and marketing of bituminous coal both in interstate and intrastate commerce be not subjected to interruptions, dislocations, burdens or restraints.

44. The resources of bituminous coal and the natural conditions of the coal deposits in the United States are favorable to low cost mining. Technical efficiency in the bituminous coal industry of the country is high and has been increasing; the output per man per day employed is high. (Tr. 393-396.) The output per man per day in the United States bituminous mines is 4.9 metric tons; for Great Britain, 1.3 metric tons; for the Ruhr District of Germany, 1.6 metric tons; for France, 1.0 metric tons; for Belgium, 0.8 metric tons. (Tr. 394.) The output per man per day in the bituminous mines of the United States has increased from 2.56 net tons in 1890 to 5.22 net tons in 1932. (Tr. 395.)

45. The railroads are primarily dependent on bituminous coal for fuel. (Tr. 383.) Between 1928 and 1934 bituminous coal comprised from 26.9 per cent to 33.8 per cent of the total freight tonnage carried by the railroads engaged in interstate commerce and from 16.2 to 19.7 per cent of the total freight revenue of the such railroads was derived from the transportation of bituminous coal. (Def. Ex. 35.)

VIII. Distribution of Bituminous Coal.

46. Commercially important deposits of bituminous coal within the United States are limited to 23 producing areas confined within the boundaries of 26 states, and more than 70 per cent of the total annual output is mined in 4 states, namely, Pennsylvania, West Virginia, Kentucky and Illinois. (Def. Ex. 9, 11. R. 33-34.)

47. In 1929 (the only year for which complete figures as to distribution are available) 23.8% of all bituminous coal produced in the United States was sold to railroads subject to the jurisdiction of the Interstate Commerce Commission, for fuel. 69.1% of such railroad fuel was delivered directly to the purchasing railroad at the mouth of the mine, no freight being paid thereon. The evidence does not show the proportion of said coal which was used by the railroad in interstate operations as distinct from local operations. 50% was shipped to consumers (other than railroads) in states other than the state of production or to consumers in foreign countries; and 26.2% was shipped to consumers (other than railroads) within the state of production (Def. Ex. 13, 14; Pl. Ex.

67; Tr. 478, 1293; 1542-3.) Bituminous coal mined in every state competes in the consuming markets with bituminous coal mined in other states. Bituminous coal in substantial quantity is received in interstate commerce from other states by every state which produces bituminous coal. (Def. Ex. 9, 10.) In every state producing bituminous coal intrastate shipments from the mines of that state meet active competition from interstate shipments. (Tr. 1947.) (Def. Ex. 9, 10, 15, 16.) The destination to which the coal produced in any one state is shipped and the determination of the direction in which it is shipped are influenced by variations in the price at which it may be sold. A change of a few cents a ton in the price at which coal is offered for sale may materially affect the decisions of consumers as to whether or not to buy coal from a particular producer, from a particular mine, or from a particular producing area. (Tr. 301.)

48. The general custom but not the invariable practice in the coal industry is for the producer to secure orders for coal through selling agents in consuming markets in various parts of the country before mining the coal. Customarily the mine is not operated unless and until orders have been previously obtained, and it is operated for the purpose of filling such orders. Since the coal as it comes out of the mine is in various sizes and since the orders secured in advance (if for sized coal) may not cover all the various sizes of coal in equal proportions, unsold coal (in the sizes for which orders have not been obtained) is also produced in the mining operation. (Tr. 283-290, 292, 565, 764, 1150.)

49. As a general rule there are no facilities for

storing coal at the mines, although (Tr. 293, 566, 766) some mines maintain storage yards. (Tr. 293.) Sized coal, tends to disintegrate into smaller sizes if stored, and the cost of dumping coal for storage and loading it again into railroad cars also tends to prevent storing at the mine. (Tr. 566.) The total amount of coal stored at the mines is infinitesimal compared with the total amount produced and shipped (Tr. 566, 766). For these reasons coal is not usually mined until orders are on hand and until railroad cars are or will be available at the mines when the coal is brought to the surface. (Tr. 886.) After being brought to the surface the coal (if the orders call for mine run) is loaded from the mine cars into railroad cars and shipped to the purchaser, but if the orders call for sized coal, the coal is separated into sizes by being run over screens and in some cases treated with chemicals for various purposes before being loaded into cars and, if sold, shipped to the purchaser (Tr. 291, 567, 765, 953).

50. Any unsold sizes, as a general rule, are loaded into railroad cars and either held on the tracks at the mine until orders are received or shipped to a consuming market in the hope that orders will be received before the coal arrives. The producer tries to move these cars as rapidly as possible since unless he has storage facilities he cannot continue to operate his mine if his tracks are filled with loaded cars. (Tr. 765.) If a producer ships the coal before orders are received, he is subject to pressure to sell it immediately, even at a price lower than the market, in order to avoid the heavy demurrage charges which will accrue if the cars are held in the railroad yards for any period of time before sale. (Tr. 1245-6.) Such

coal is known as "distress coal." (Tr. 766, 855.) Frequently it is offered for sale through a number of brokers or middle houses at the same time, and the buyer under those conditions gets the impression that there is a great deal more coal being offered on the market than really is offered. Distress coal affects the market price and depresses it. (Tr. 766.)

51. Sales of bituminous coal are customarily negotiated between producers and purchasers in the various states in terms of price f.o.b. mine, with a provision that the coal is to be consigned to purchaser at named destination. Many contracts specify that there shall be no diversion of the coal in transit without the consent of the producer. The producer generally orders the cars which are to carry the coal, loads the coal in the cars, and gives the carrier shipping instructions, and the producer's shipping clerk furnishes a bill of lading to either the buyer or the producer. (Tr. 783-784.)

52. If coal produced and sold for use in the state of production were sold at lower mine prices resulting in delivered prices lower than comparable coal produced outside the state shipments of such coal into the state would be diminished and intrastate shipments of coal within the state would be increased. (Tr. 1946, 1947.)

IX. Competition with Other Fuels.

53. Anthracite or semi-anthracite coal is produced commercially in 5 States, and 99% thereof is produced within the State of Pennsylvania (Pl. Ex. 81C-E). Anthracite is consumed and competes to some degree with bituminous coal in 20 States (Nebraska, Kansas, Iowa, Missouri, Illinois, Indiana,

Michigan, Ohio, Maryland, District of Columbia, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine) and also in the Lake Ports (Tr. 280; Pl. Exs. 33, 34). The f.o.b. mine prices of anthracite, which has no greater heat value than bituminous, are a great deal higher than those of bituminous coal, however, so that anthracite competes primarily because of its superior cleanliness and its smokeless qualities in those markets where price is not significant or in the areas (New York, New Jersey and Pennsylvania) where it enjoys a considerable freight advantage (Tr. 1145-6). No substantial shift on a national scale to anthracite would result from a rise of 20 to 30 cents in bituminous f.o.b. mine prices, although there might be some shifts in those areas near the anthracite fields in which the two types of fuel actively compete, which include areas in which the Carter Coal Company is selling coal.

54. Fuel oil and bituminous coal compete generally in some areas, but industrial consumers without convertible equipment, because of the cost of conversion, will not ordinarily shift from coal to oil unless they are of opinion that the cost of coal will be considerably higher than that of oil over a considerable period of time. (Tr. 735.) Although the cost of installing new equipment is an important factor nevertheless slight increases in bituminous coal prices may affect the decision of large coal buyers with respect to converting their plants to competing forms of fuel (Tr. 279, 735-736, 940; Pl. Ex. 32). About one-half of the production of the Carter Coal Company is sold to large consumers either for metal-

lurgical purposes or for generating steam in large steam plants (Tr. 279).

55. There was a considerable shift from bituminous coal to oil and other competing fuels up through 1932, but in 1933 and 1934, there was a slight tendency in the opposite direction. (Tr. 733, Def. Exhibit 52.) The percentage of the total national supply of energy obtained from bituminous coal dropped from 70.3% in 1913 to 45% in 1932, substantially influenced by the tremendous increase during the period in the use of gasoline in motor vehicles. (Tr. 383, 439.) In 1934, water power supplied 9.3%, natural gas 8.7%, oil 28%, anthracite coal 7.7%, and bituminous coal 46.3% of the national energy. (Tr. 382, Def. Exhibit 52.) The tendency is for higher prices for coal in relation to the prices for gas, oil and hydro-electric power to result in increased use of such competing fuels. (Tr. 279, 940.)

X. General Conditions in Industry Affecting Competition and Prices.

56. Coal is sold as mine-run or in various sizes, such as (in order of size) lump, (the largest) egg, stove, chestnut, pea and slack (the smallest). Some of these are further subdivided into sizes. (Tr. 289-290.) Coal not screened (i.e. segregated according to size) is termed "mine-run" coal. Coal generally is sold seasonally. During the summer season it is more difficult to dispose of the larger sizes, the demand for these being primarily during the winter, since they are generally used for household or domestic purposes. (Tr. 567.) Approximately 75 per cent of the production of bituminous coal is sold by the pro-

ducers under contracts calling for the delivery of coal over a period of several months to a year. (Tr. 418.) A majority of such sales are contracted for between January 1 and March 31. (Tr. 565.)

57. The fundamental or chief underlying evil of the bituminous coal industry is over-capacity. (Tr. 537, 728, 1216.) A surplus of productive capacity over consumptive demand intensifies competition and tends to depress prices. (Tr. 548, 549, 953-4.) Surplus capacity is partly due to the necessity of maintaining capacity sufficient to meet the seasonal peak of demand in the winter and partly to over-development above and beyond the requirements of the seasonal peak. The maximum possible full-time working year is 308 days and quite a number of mines, many of which are captive mines, have actually operated 308 days; but breakdowns and power failures cause an average loss of 9 days of time. Unavoidable loss of time through the seasonal fluctuations of demand average 34 days a year over the industry as a whole. Thus, even if capacity were accurately adjusted to demand, the mines could operate only about 265 days. (Tr. 397-400.) The surplus capacity which must be maintained to meet the seasonal peak is one of the causes of the intense competition in the industry, as the operator is under pressure because of continuing fixed charges to try to sell during off-season. (Tr. 400.) There is a comparatively inelastic demand for coal. During periods of shortage the withholding of a small percentage of what the market needs will cause the price to rise sharply and substantially. In ordinary times the throwing of a small tonnage on the market above what it will absorb will depress the price. (Tr. 548-549.)

58. There has always been an excess of capacity in the industry above even the peak season requirements, and the mines on the average have never managed to operate 265 days a year. (Tr. 400-1, 531, 922, 954, 1490.) The nearest approach to this figure was 249 days during the World War. Over the last 35 years the mines have averaged 204 days. (Def. Ex. 4A.) The opportunity of the mine workers for full time employment has been correspondingly curtailed. There are more available workers for the mines than can be given full-time opportunity to work. (Tr. 696-697.)

59. It is the normal tendency in mineral economics for increases in price by an amount greater than increases in costs, to lead to increases in the number of mines, and the normal result of increases in the number of mines is a further increase in capacity. (Tr. 537, 539, 540.)

60. Shut-down costs of a bituminous coal mine are high unless the mine is permanently abandoned. If a mine is shut down with the expectation of reopening it, it often must be continually pumped, the roofs must be supported and the entries kept in repair. Taxes and royalties (if they exist) must be paid. (Tr. 954-5, 1218.) Operators often lose less money by continuing to operate a mine than to shut down altogether, even though the price received for the coal is less than the actual cost, if all items of cost are considered. For this reason, among others, it has been a common practice for operators of bituminous coal mines to continue operating although the price of coal has become less than the cost of production. (Tr. 620, 1218.)

61. The pressure to reduce overhead costs while the mine is in operation is an additional factor which prevents an adjustment between capacity and demand. Overhead costs in the operation of a mine are relatively constant, regardless of how much coal is produced. Although prices may be lower than costs, losses may be diminished if coal can be sold above actual out-of-pocket costs. (Tr. 1218, 911.) Costs per ton vary materially in proportion to the number of days of operation. There is consequently a tendency to reduce prices in order to obtain sufficient orders to keep the mine running at full capacity. Many producers accordingly seek to increase their tonnage by offering coal for sale at prices lower than the market, even if such prices are below the cost of production. (Tr. 621, 911.)

62. Although a mine operator may continue to operate his business at a loss until forced into bankruptcy, it does not follow that the capacity of his mine is removed from the market. Often when one operator becomes financially unable to operate a mine, another operator takes the mine over with the capital charges previously extant removed. The new owner thus has lower costs which enable him to undersell his competitors. (Tr. 955-6; 1618-20.)

63. Another element in the competitive situation is the existence of so-called captive mines, which are owned and operated by large coal consumers, such as steel companies, railroads and public utilities. If prices reach high enough levels, more mines may be acquired by consumers and operated as captive mines (Tr. 282).

63a. Railroad freight charges on coal are comparatively rigid and inflexible. They make up half or more of the delivered cost of coal at the consignee's siding. (Tr. 283.) Transportation charges are not reduced as delivered prices are reduced, so that substantially the full burden of such reduction is borne by the price received by the operator f.o.b. mine.

The average mine price, freight charge, and delivered cost at consignee's siding are shown below:

	1923	1928	1929	1930	1931	1932	1933
1. Average sales realization f.o.b. mine*	$2.68	$2.06	$1.78	$1.70	$1.54	$1.31	$1.34
2. Average freight charge per ton†	2.36	2.27	2.25	2.23	2.22	2.26	2.20
3. Total delivered cost (1) and (2)	$5.04	$4.33	$4.03	$3.93	$3.76	$3.57	$3.54
4. Percent freight charge of total	46.9%	52.5%	55.8%	56.7%	59.0%	63.3%	62.1%

* Def. Ex. 3A.

† Def. Ex. 35. Figures for 1923 from Interstate Commerce Commission Bureau of Statistics, Report No. 23,157.

Between 1923 and 1933, the average railroad freight charge was reduced 16c a ton, while the average sales realization f.o.b. mine was reduced $1.34 a ton.

64. The cost of labor in the production of coal averages between 60 per cent and 65 per cent of the total cost of production. The remaining costs consist of such items as taxes, insurance, interest, selling and administrative expenses, depreciation and depletion, some of which are fixed and other of which offer little leeway for making reductions. (Tr. 319, 1046.) The percentage of labor cost to value is very much higher in the bituminous coal industry than in any other large industry excepting anthracite coal.

(Tr. 1219; Def. Ex. 38.) As a result, wage rates are an important element in the conduct of the business of coal mining. (Tr. 319, 1218.) Wages in the coal industries constituted in 1929 (the most recent year for which comparable figures are available) over 59 per cent of the total value of the product, whereas the general average for the four other large mining industries was 21 per cent and for the 48 large manufacturing industries 18.2 per cent. (Def. Ex. 38.) As a result the pressure of competition acts with particular force to cause wage reductions in the bituminous coal industry. Where one employer cuts his wage costs his competitors in order to maintain their share of the market, must do likewise. (Tr. 1221.)

65. The average of employment in bituminous coal mining is irregular and intermittent. Over the last 35 years the mines have averaged 204 days of operation per year, or 3.9 days a week. (Def. Ex. 4A.) This has meant an average idleness of 104 days out of the 308 days in a nominal working year. The highest average working time ever attained was 249 days in 1918, the year of the munitions demand. In 1929, the mines averaged 219 days, or 4.2 days a week. In 1933, they averaged 167 days, or 3.2 days a week. (Def. Ex. 4A.) The idle days are scattered a few days a week over much, if not all, of the year. (U. S. Coal Comm. Rep. p. 1133.) The bituminous coal industry is an industry in which unemployment, resulting from irregular operation, is chronic. (Report of U. S. Coal Comm. on Labor Relations in Coal Mining, Vol. 3, p. 1308.)

66. Adequacy of wages in the mines should also be considered in the light of the high accident hazard. In 1930 and 1934, the accident severity rate at

bituminous coal mines was higher than in any other industry reporting to the National Safety Council. The accident frequency rate in bituminous coal mines was higher than in any other industry in 1930, and in 1934 it was higher than in any other industry except anthracite coal mining and lumbering. (Tr. 1511-1512. Def. Ex. 40, 40A.) In 1934, the accident frequency rate in bituminous mines was 2.9 times as great as the average for all industries, and the accident severity rate was 6.7 times the average for all industries. (Ibid.) The actuarial chance of death in the mines, judging from the last 5 years experience, is 1 out of 10, that is 1 out of 10 men who spend their working lives in the mines will be killed in a mine accident. (Tr. 1518.) The American accident rate in the year 1933 was the highest of any important coal mining country in the world. In American bituminous coal mines 3.6 men were killed per 1,000 employed, as against 1.0 in Great Britain. (Def. Ex. 41.)

XI. Freight Rates.

67. Freight rates are an important factor in the coal industry and have a substantial relation to competition in coal sales, one-half or more of the delivered cost of coal at the consignee's siding being generally represented by transportation costs. (Tr. 283.) Competition is really based upon delivered prices (Tr. 766), and consequently one of the principal factors in determining variation of prices between different markets is transportation costs. (Tr. 294.)

68. The freight rates on coal from the smokeless fields of West Virginia (in which the principal mines

of the defendant Carter Coal Company are located) to the principal consuming points in the Central Freight Association territory (Indiana, Illinois, Ohio and Michigan points and Lake cargo ports) are greater (in amounts varying from 10c to $1.30 per ton) than freight rates for competing coals from such important districts as Pittsburgh, Connellsville, Kenova-Thacker, Kanawha, Fairmont, Big Sandy, Jellicoe and Hazard, all of which are in Minimum Price Area No. 1, as defined in the Bituminous Coal Conservation Act of 1935 and in the Bituminous Coal Code promulgated thereunder. In respect of the bulk of their shipments north and west into such Central Freight Association territory constituting approximately 51% of their total shipments the producers in the Smokeless Fields are subject to an unfavorable differential of 25c as against said other areas nearer those consuming markets. (Pl. Ex. 53-56; Tr. 364.) The record does not show the differentials in shipments to areas to which the smokeless fields are nearer the market than the other areas named. The relative proportions shipped to the various consuming markets are shown in Defendants' Exhibit 1.

69. Car supply is also an important factor in the coal industry. Coal mines are dependent upon continuous flow of cars at the mine in order that operators may ship their products. Even at the present time, when motor truck traffic has largely increased, only about 4.6 per cent of the total output of coal is handled in trucks and that part which is sold commercially moves almost entirely in railroad cars. (Tr. 420.)

XII. Bituminous Coal Production by States—Growth of Proportionate Share of Southern Mines.

70. The only official record of bituminous coal production prior to 1820 is of 3,000 tons being produced in Maryland. By 1850 Pennsylvania had become the leading producing state, and the principal coal producing states north of the Potomac and Ohio Rivers (Pennsylvania, Ohio, Indiana and Illinois, hereinafter called the "northern states") produced approximately 70% of the total national production. In 1880 the northern states produced approximately 75%. West Virginia (which eventually became in 1934 the principal coal producer in the United States) produced less than 5% in 1880. In 1910 the northern states produced approximately 60%, and West Virginia approximately 15%. (Tr. 1167-1168, 1567-1568; Pl. Exs. 69, 69-A; Def. Exs. 28, 28-A.)

71. Total production throughout the country increased progressively until 1918. After 1918 there was a flattening of the production curve, and although there have been variations from year to year, national production has, as compared with the history prior to 1918, remained relatively steady. In 1918 the aforesaid four northern states produced approximately 60% of the national tonnage; West Virginia produced approximately 16% and West Virginia, Kentucky and Virginia together (the three principal "southern states") produced approximately 23%. (Pl. Exs. 68, 68-A, 69, 69-A.)

72. Peak production was reached during the war, the peak year being 1918. In 1923 the four northern states produced approximately 56.5% and the three

southern states approximately 29.1%. In 1927, the proportion of the northern states was 41.3 per cent and that of the southern states 43.9%. In 1930 the four northern states produced approximately 46.4%, and three southern states approximately 39.3%. In 1934, the four northern states produced approximately 46.3%, and the three southern states approximately 40.5%. (Pl. Exs. 21, 69, 69-A, 68, 68-A; Def. Exs. 28, 28-A.)

73. There has, therefore, been over the history of bituminous coal production in the United States, viewed as an entirety, a gradual though irregular increase in the share enjoyed by the states of West Virginia, Virginia and Kentucky (notably West Virginia) as contrasted with the share enjoyed by the states of Pennsylvania, Ohio, Indiana and Illinois (notably Pennsylvania). (Pl. Exs. 69, 69-A.)

74. In the years prior to 1923, the more rapid growth of the three southern states was due primarily to natural causes, such as expansion of the railroad net into the southern mountains opening up whole new fields to development, with a consequent very rapid growth of mine capacity down to and including 1923. After 1923 capacity declined in the south although it was a slight decrease in comparison with the very high mortality in the north, and the increase in southern production which continued thereafter was attained by working existing capacity more steadily. (Tr. 1545-1546.) Other causes of the relative growth of the south have been a shift in market demand from bee-hive to by-product coke in the prewar years, (Tr. 397) superiority of southern coals over some northern coals (Tr. 821, 973) comparatively better natural conditions in the south in the

period of earlier development of the mines (Tr. 1545-6); and lower wage rates. The southern mines have always enjoyed a wage differential under the north. Some differential appears necessary to enable the south to absorb freight differentials into northern markets. (Tr. 551.)

XIII. Decline in Growth of Demand for Bituminous Coal and Reasons Therefor.

75. Prior to 1918 the demand for coal had been steadily increasing. Demand has flattened off since that date, and at no time since the war has demand reached the war peak. The principal factors in the falling off of demand have been (a) changes in the fuel-using industries, such as the tendency to produce fabricated materials instead of crude materials, like crude iron and steel products, and the substitution by iron and steel companies of scrap for virgin pig iron, resulting in the slackening off in the use of coke; (b) improvements in fuel burning equipment which have materially decreased the amount of coal required for the production of energy units; and (c) increased use of competing fuels and forms of energy, particularly oil, natural gas and hydro-electric energy (Tr. 268-270; 437-438; Pl. Exs. 20-25). In recent years the general slowing up of business due to the economic depression has further hastened the decline.

76. The slowing down in demand was due in part to a shift in manufacturing from crude heavy products to lighter products requiring less fuel and to the substitution of scrap iron for virgin pig iron. This reduced the quantity of coal required to make blast furnace coke and was an important cause of the

flattening off of demand because next to the railroads, the iron and steel industry was the largest single consumer of coal. A second factor was increasing efficiency in the use of fuel stimulated by the high prices of fuel associated with the War. In the period since the War the average saving in the consumption of fuel per unit of product in all branches of industry and transportation has been between 20% and 30%. This was the largest single factor in the slowing down of coal demand. As the result of improvements in fuel burning equipment by steam railroads, the average requirements of coal for each 1,000 gross ton miles of freight were reduced by 28.8% between 1919 and 1933; in electric power plants the coal used to generate one kilowatt hour of power was reduced by 53%; the amount of coking coal to smelt 1 ton of pig iron was reduced 19.6%; the use of the by-product oven in place of the bee-hive coke ovens account for a saving of 19% in fuel use (Tr. 437, 438; Pl. Ex. 23.) A third factor was the competition of other sources of energy. The Federal Water Power Act of 1920 had facilitated rapid development of many new power sites, and private construction was supplemented by public construction projects. There was a great increase in production of petroleum and gas. With respect to this competition with other forms of energy see Findings 53-55.

XIV. Chronological Survey of the Industry.

A. The Pre-War Period

77. A surplus of mine capacity existed before the World War, although the rapid and relatively constant growth of demand at that time tended to relieve

the competitive pressure exerted by it. (Tr. 401, 437.) The surplus of mines and mine capacity was the result of many causes, including the widespread ownership of coal resources and the desire of owners to realize upon them; the pressure upon land-holding companies to open mines in order to meet taxes and carrying charges; shifts in market demand which threw tonnages from one district to another district, such as the change from beehive to by-product coking which caused a transfer of a heavy load of business from some of the northern fields formerly producing beehive coke to the southern fields which were in a position to supply by-product coke in markets where by-product ovens were established; expansion of the railroad net; freight rate and wage rate structures which were, on the whole, so adjusted as to encourage development of the outlyingdistricts; and periodic large-scale suspensions in the organized fields which caused consumers of coal during the period of the suspensions to seek sources of supply elsewhere. (Tr. 396-7.)

78. The total capacity at full time of 308 days increased from 254,000,000 tons in 1899 to 668,000,000 tons in 1914. In no year during this period did the average working time exceed 234 days. For the entire period the average time worked was 218 days. (Def. Ex. 4A and 3A.) Demand, however, was increasing in approximately the same ratio as capacity, the production rising from 193,000,000 in 1899 to 478,000,000 tons in 1913 and 423,000,000 tons in 1914. Throughout this period capacity increased in advance of demand; the rela-

tive excess of capacity showed no great change from 1899 to the time of the War. (Def. Ex. 3 and 3A.)

79. The level of wage rates in the union districts in the pre-war period is illustrated by the Illinois rate for trackmen, an occupation typical of the skilled day-wage workers underground. This rate for trackmen was $1.90 in 1899, $2.28 per day in 1900, and $2.85 per day in 1913-1914. (Def. Exs. 4 and 4A.) In the comparatively active year 1913, the mines of Illinois averaged 189 days operation. This would give the Illinois day worker an annual income of about $540. (Tr. 409.) For the industry as a whole the average number of days operated in 1913 was 232. (Def. Ex. 4A.) A man working that number of days and receiving the Illinois rate would earn $661.

80. When union wage contracts expired, it was found difficult to renew them on terms mutually satisfactory, and at the expiration of wage contracts suspensions of mining operations in union areas took place in 1904, 1906, 1908, 1910, 1912, and 1914. (Pl. Ex. 66; Def. Ex. 4; Tr. 411, 413-415.) The suspension of 1906 involved approximately 211,000 men in 10 states and lasted in the different districts from 2 to 3 months. In the suspension of 1910, again approximately 211,000 men were involved, this time in 10 states, the duration of the dispute ranging in different states from 45 days to 157 days. (Tr. 412-414; Pl. Ex. 66.) The resistance of the union employers to renewal of the agreements was due largely to an inability to meet the competition of other operators who were free to adjust or to lower wages and were not bound by collective agreements. (Tr. 411.) The net increase in wages obtained by

the organized miners during the period from 1900 down to the World War, as illustrated by the Illinois trackmen's rate, was 57 cents a day. In 1900 the rate was $2.28. An increase to $2.56 a day was granted in 1903, followed by a decrease to $2.42 effective for two years beginning 1904. In 1906 the rate was again restored to $2.56. In 1910, after a five month's suspension, it was increased to $2.70. In 1912 it increased to $2.85, at which level it remained until the coming of the war boom in 1916. (Def. Exs. 4 and 4A.)

81. Strikes also occurred in the pre-war period in attempts to gain recognition of the union and to secure collective wage agreements in the non-union fields. These strikes included the following: (Pl. Ex. 66.)

Year	State	Men on Strike	Average days lost per man on strike
1902	Southern West Virginia	18,129	75
1902	Alabama	6,059	23
1903	Alabama	7,319	32
1903	Colorado	7,103	57
1904	"	3,865	125
1904	Alabama	9,518	80
1912	West Virginia	12,165	50
1913	(Paint Creek and Cabin Creek)	8,800	43
1913	Colorado	7,324	75
1914	(Ludlow Strike)	4,418	247

82. The strike of 1912-1923 in the Paint Creek and Cabin Creek District of West Virginia was accompanied by bloodshed and declaration of martial law and led to investigation by the United States Senate. (Conditions in Paint Creek District, West Virginia; Hearings before a subcommittee of Senate Committee on Education and Labor, 63d Congress, 1st Session, pursuant to S. Res. 37.) The strike in Colorado in 1913-1914 was likewise accompanied by bloodshed,

use of the state militia, and federal troops (Tr. 1270) and a Congressional investigation. (Tr. 1249-51.) (House Committee on Mines and Mining. Conditions in the Coal Mines of Colorado. Hearings before a Subcommittee on Mines and Mining, pursuant to H. R. 387.)

B. The War Period and Post-War Period 1916-1922

83. Although there was no lack of physical mine capacity at any time during the War, a shortage of bituminous coal developed in 1916 which continued through the period of the World War and led to control of prices and distribution by the Federal Government. (Tr. 422-23.) The average spot price, f.o.b. mines, (sales on the open market which ordinarily constitute approximately 25% of the total sales) rose from $1.30 a ton in August, 1916, to $3.87 in November and to $4.18 in February, 1917. (Def. Ex. 5, 5A; Tr. 418.) The primary cause of the coal shortage was congestion of railway transportation. It was due in part to an increase in traffic of other commodities and in part to an increase in the movement of coal itself. Consumption of coal rose to an all-time maximum, the high prices encouraged the opening of more than a thousand new mines, each of which demanded its share of railroad cars. (Tr. 419-20.) Consumers protested against the high prices, and shortage of coal became for a time a limiting factor in the war program. (Senate Hearings on Increased Price of Coal.) Attempts by the Government to control the price by voluntary agreements with the producers were only partially

successful, and the President under the Lever Act was authorized among other things to fix prices of coal and distribute the available supply. As finally adjusted, the average price fixed, f.o.b. mines, was $2.58 (Tr. 422; Def. Ex. 5A.) For the first six months of its work the Fuel Administration was able to accomplish little in the control of distribution (Tr. 518), and serious shortage of coal continued until March, 1918. The control of distribution as finally worked out was effected by reducing the cross-hauling of coal so as to permit the railroads to handle increased tonnage with the same equipment. Consuming markets were zoned and producing districts assigned a budget, specifying the tonnage to be supplied from each district to each zone. The zones and the budget of the Fuel Administration proved effective. Production increased sufficiently to meet all requirements, and on the day of the Armistice, consumers had been supplied with reserve stocks of 63,000,000 tons, which was twice any preceding known stock and was an amount adequate to meet any possible need. (Tr. 422-423.)

84. A second acute shortage of coal occurred in 1919 to 1920. The initial cause was a general strike of all union miners, which began November 1, 1919, and lasted to December 16. A total of 415,000 men were on strike in 22 states. (Tr. 426.) By the time the strike had reached its sixth (and last) week consumers' stocks in the territory north of the Ohio and Potomac and east of the Mississippi were dangerously low and industries were beginning to close for lack of fuel. (Coal in 1919, 1920, and 1921, p. 453.) After the miners' strike was

settled, but before consumers had succeeded in rebuilding their customary stocks, an outlaw strike of railway switchmen, beginning April 1, 1920, congested railroad terminals and created an acute shortage of cars at the mines. At the same time the British Government placed a limitation on customary exports of coal from the United Kingdom, creating an active demand for the export of American coal. These three factors drove up the price to unprecedented heights. (Tr. 427-428.) From November 1, 1919, to March 31, 1920, the Government fixed maximum prices, acting under the Lever Act. (Tr. 426.) The average spot price, f.o.b. mines, fixed by the Government as of March, 1920, was $2.58 a ton. When the price regulations were removed, the average spot price, f.o.b. mines, rose to a peak of $9.51 a ton in August, 1920. (Def. Exs. 5 and 5A.) The increase of prices was greatest on the eastern seaboard where sales at $20 a ton, f.o.b. mines, were reported. The average spot price of Pocahontas coal in August was $12.90 a ton, f.o.b. mines, and that of Somerset mine-run coal was $11.97 a ton. (Tr. 428.) These prices refer to spot sales, which ordinarily constitute about 25 per cent of total sales. (Def. Ex. 20.) The average sales realization for the year 1920, contract and spot business for the country as a whole, was $3.75 a ton. (Def. Exs. 3 and 3A.)

85. Another acute shortage of coal occurred in 1922. The primary cause was a suspension of mining at the expiration of the wage agreement on March 31, 1922, which affected all of the union bituminous mines and the non-union mines in a number of districts and was accompanied by a simultaneous suspension at the anthracite mines. This strike resulted

from the refusal of the union operators to renew the agreement on the basis of prevailing wages because of competition from non-union operators paying lower wages. (Tr. 1012.) In this suspension 460,000 bituminous miners went out, and at one time 73 per cent of the productive capacity of the bituminous coal fields was shut down. At the same time, 142,000 anthracite miners went out. The strike began April 1, 1922, and lasted officially to August 16, some districts remaining out into September, 1922. (Tr. 429-430.) The effects of the mine suspension were accentuated by a strike of the railway shopmen on July 1, 1922, which created a further shortage of railway cars in the non-union coal fields. (Tr. 430.) During the 1922 shortage the average spot price of bituminous coal, f.o.b. mines, rose from $2.12 a ton in March, 1922, before the suspension, to a peak of $6.13 a ton in August, 1922. (Def. Exs. 5 and 5A.) The average spot price for the year 1922 was $3.64 a ton and the average sales realization, including contract as well as spot sales, was $3.02. (Def. Exs. 3 and 3A.)

86. These shortages of coal led to intervention by the Federal Government and the individual States in attempts to protect consumers. During the shortage of 1920 the Indiana Legislature created a Special Coal and Food Commission and directed it to set maximum prices on coal produced in the state of Indiana and to distribute coal at this maximum price to domestic consumers in Indiana and to other classifications of consumers in particular need. (Tr. 433-434.)

87. During the strike of 1919 the Federal Government restored the regulations of the United States

Fuel Administration under the Lever Act, reinstated the maximum prices fixed during the War, and distributed the limited supply of coal to consumers most in need. (Tr. 426.) To arbitrate the issue in dispute at this strike the President tendered his offices and appointed the "United States Bituminous Coal Commission" which handed down its award, effective April 1, 1920. In the shortage of 1920 use was made of the powers of the Interstate Commerce Commission under the Transportation Act to declare priorities in the movement of coal. (Tr. 433.) During the strike of 1922 the President attempted to effect a settlement, (U. S. Bureau of Mines, Coal, 1922, P. 450) the priority powers of the Interstate Commerce Commission were again utilized, and a Presidential Fuel Distribution Committee was set up. In September, 1922, Congress passed an act creating the office of Federal Fuel Distributor for a period of one year. (Tr. 433-4.) Between 1917 and 1922, six Congressional Investigations were made with reference to the price and supply of coal. By an Act approved September 22, 1922, Congress created the United States Coal Commission to make an investigation of the coal industry and to report its findings and recommendations to Congress. Among other findings and recommendations, this Commission concluded that:

(1) Coal mining is an indispensable public service.

(2) Continuous fact-finding on the basis of compulsory submission of reports is advisable.

(3) A Coal Division should be established in the Interstate Commerce Commission.

(4) A Federal license should be required of shippers of coal in interstate commerce.

(Report of the U. S. Coal Commission, pp. 259, 263, 264, 269.)

88. These shortages laid a burden on the consumer of coal. See finding 84 as to 1919-1920. During the 1922 shortage buyers were frequently compelled to accept impure coal or coal from unaccustomed sources not suited to their requirements. Numerous locomotive failures on the railroads occurred as a result of inferior coal they were compelled to use. Consumers had to put in heavy stocks of coal in anticipation of a suspension of mining. Consumers' stocks at the beginning of the 1922 suspension were 60,000,000 tons, or 30,000,000 tons above what would have been needed had there been no strike. (Tr. 430.) There were many complaints to Congress by consumers concerning the high prices. (Hearings before the Select Committee on Reconstruction and Production, United States Senate, Sixty-sixth Congress, 3rd Session, Senate Resolution 350.) The following table taken from an investigation by the Interstate Commerce Commission, "Increased Cost of Railroad Fuel, 1920, Report of the Commission to the Senate of the United States in response to Senate Resolution No. 412:" (Def. Ex. 20) shows the increased cost of coal to Class 1 steam railroads in 1920 over 1919.

QUANTITY AND COST OF FUEL PURCHASED BY CLASS I STEAM RAILROADS IN THE CALENDAR YEARS 1919 AND 1920

	New England Region	Pocahontas Region	Total, all Regions
Spot purchases			
Tons purchased:			
1919	1,617,282	1,683,181	16,381,503
1920	3,346,023	2,961,299	29,857,090
Average cost per ton at mine:			
1919	$2.46	$2.75	$2.83
1920	$6.25	$4.53	$4.53
Contract purchases			
Tons purchased:			
1919	3,732,109	4,226,033	107,526,005
1920	4,028,518	3,802,532	125,486,545
Average cost per ton at mine:			
1919	$2.52	$2.49	$2.56
1920	$3.79	$3.35	$3.22
Average delivered cost, all purchases, including freight charges			
1919	$5.17	$2.67	$3.15
1920	$8.09	$3.99	$4.13

In 1920 the railroads purchased 19.5% of their coal at spot prices. (Tr. 494.) In general the prices paid by the railroads during the periods of shortage did not rise as high as the prices paid by other purchasers, because of the concentrated buying power of the carriers. (Tr. 493-5.)

89. From 1916 to 1922 there was a great increase in mine capacity and in number of mines. (Tr. 432.) The number of commercial mines in operation (not counting wagon mines producing less than 1,000 tons a year) increased from 5,726 in 1916 to 8,319 in 1918 and 9,299 in 1922. A further slight increase occurred in 1923, when the number of mines in operation was 9,331. (Def. Exs. 4 and 4A.)

The greatest increase in the number of mines occurred during the war; the greatest increase in mine capacity occurred somewhat later. The calculated total mine capacity on the 308-day basis increased from 673,000,000 tons in 1916 to 736,000,000 tons in 1919 and thereafter to 970,000,000 tons in 1923, an increase in the seven-year period of 44% (Def. Exs. 3 and 3A). Production in 1916 was 503,000,000 tons, in 1919 it dropped to 466,000,000 tons and in 1923 it was 565,000,000 tons, an increase of only 12% over 1916. (Def. Ex. 3-3A.)

90. While the capacity was thus increasing after the war, the demand for coal had ceased to grow as formerly. Prior to 1918, the demand was increasing at an average rate of 13,000,000 tons a year. After 1918 it flattened off, and at no time since has it equalled the war peak. (Tr. 427.) See findings 77 and 78, ante. There was, however, no actual decrease in the consumption during the decade of the 1920's. In 1929, both production and consumption were higher than the average for 1922-24, and substantially higher than for 1913. Consumption for that year was higher than at any time since the war peak, except for 1926, when bituminous coal was required to replace anthracite on account of the hard coal strike (Tr. 440-441). The trend of production, and of the net consumption, allowing for exports and changes in consumers stocks, are shown below. The figures are in million tons.

	1913	1918	1919	1920	1921	1922	1923	1924	1925	1926	1927	1928	1929
Production*	478	579	466	569	416	422	565	484	520	572	518	501	535
Net consumption†	460	531	482	509	392	427	519	484	499	533	500	499	520

* Def. Ex. 3A.

† Allowing for exports and changes in consumers stocks. Tr. p. 437. U. S. Bureau of Mines "Coal in 1929," p. 688.

91. During the pre-war period (1900 to 1916) average sales realization on bituminous coal had not exceeded $1.32 per ton in any year, running from a low of $1.04 in 1900 to a high of $1.32 in 1916. During the War period and post-War period, sales realizations were high, running from a low of $2.26 in 1917 to a high of $3.75 in 1920 and standing at $3.02 in 1922.

C. The Period from 1923 to 1933

92. The combination of increased surplus of capacity and a comparatively stationary demand resulted in a drastic liquidation in both mines and plant capacity in the industry after 1923. (Tr. 441-43.) By the middle of 1923 the railroads had greatly improved their service and car shortage at the mines was eliminated as a factor limiting production. In February, 1924, signature of a three-year wage contract between the miners and the organized operators, known as the Jacksonville agreement, eliminated the prospect of any national strike until 1927. (Tr. 922-25, 931.) With the causes of previous shortages removed, the great surplus of mine capacity was now free to exert its full pressure upon the market and a period of intense and destructive competition ensued. (Tr. 440.) For American business in general the years 1924 to 1929 were unusually prosperous, accompanied by increasing employment and payrolls. For bituminous coal mining the same period was marked by declining employment and payrolls and (except possibly for the year 1926) by a financial deficit for the industry as a whole. (Tr. 1216.) (Def. Ex. 6, 6A, 49, 49A.)

93. Competitive conditions after 1923 caused

thousands of mines to be shut down or abandoned. Between 1923 and 1930 the number of commercial mines in operation producing 1,000 or more tons per year, dropped from 9,331 to 5,891, a decrease of 3,440 mines. (Tr. 441-2.) (Def. Ex. 4a.)

This figure does not represent the total number of shut-downs or abandonments but the net decline in the number of such mines in operation. It is estimated that at least 4,800 individual mines had been forced out of business from 1923 to 1930, and in all probability exhaustion of the coal accounted for a very small part. In the meantime a considerable number of small trucking mines were newly opened utilizing hard roads and motor transports. (Tr. 441-442.)

94. Of these mines shut down since 1923, large numbers are idle but not finally abandoned. In 1930, there were 1,355 such mines on the books of the Bureau of Mines shut down but not permanently abandoned. Their capacity, when formerly operated, was 130,000,000 tons a year. No complete count of the mines shut down but not abandoned has been made since 1930. A test count in three states showed that, out of 291 in the class shut-down but not abandoned in 1930, 203 have since been permanently dropped, and 88 are still shut down but not finally abandoned. (Tr. 442-44.) The physical condition of such mines shut down but not abandoned varies greatly. Hundreds of them are insuch condition that it is improbable they will be brought into production agani short of another World War. (Tr. 443.) An appreciable number are in such condition that a sustained advance in price in excess of production costs would bring them back into the market. Their pres-

ence is an element of potential competition. While no definite figures are available, it is estimated abandonment of mines before exhaustion has resulted in a considerable waste of coal resources. (Tr. 788, 1488-89.)

95. The capacity in operation (308-day basis) was reduced from 970,000,000 tons in 1923 to 770,000,000 tons in 1930 (Def. Exs. 3 and 3A) and to 615,000,000 in 1933. In 1923 production was 565,000,000. In 1933 it was 334,000,000. In 1923 capacity was 73% in excess of production. In 1933 it was 84% in excess (Def. Ex. 3A).

96. The competitive conditions existing after 1923 caused the price of bituminous coal to fall substantially, and resulted in the average mine realization price of the industry as a whole being less than the costs of production of the industry as a whole. The average sales realization declined from $2.68 a ton in 1923 to $2.20 in 1924, a drop of 48 cents in one year. The decline continued thereafter, interrupted only in 1926 in which year there was a temporary recovery of 2 cents a ton. In 1925 the average sales realization was $2.04; in 1926 it was $2.06; in 1927 it was $1.99; and in 1928 it was $1.86. By 1929 the average realization had declined to $1.78 a ton, a decrease of 90 cents a ton or 33.6% below 1923. In 1930 the average sales realization was $1.70 and in 1931 was $1.54. By 1932 the average realization had fallen to $1.31 a ton. In 1933 the average sales realization price was $1.34. (Def. Exs. 3 and 3A.) The decline of one-third in the average realization from 1923 to 1929 took place in a period of general business prosperity when the average of

commodity prices was relatively stable. After 1929 there was a period of general business depression when the average of commodity prices declined approximately one-third.

97. The trend of mine realization prices throughout the country from 1913 to 1920-1922 was generally upward with violent fluctuations during the war and post-war period, and from 1923 through 1933 was generally downward (D. Exs. 3-A, 23). The last "runaway market" in bituminous coal was in 1922 and the first five months of 1923. The only approach to such a market was in the increased spot coal prices in 1926, which were primarily due to the British strike, and also in part to the heavy purchasing in anticipation of a possible strike (which in fact developed) in 1927 upon the termination of the Jacksonville Wage Agreement (Tr. 495-496 D. Ex. 5). The spot price curve from 1923 through 1931 does not show violent fluctuations but a steady downward trend. (Tr. 496.)

98. There have been no violent fluctuations in the prices of bituminous coal for railroad fuel since 1923. The average delivered cost per net ton of bituminous coal purchased by Class I railroads gradually declined from a high of $2.94 in 1924 to a low of $1.95 per net ton in 1933, standing at $2.20 per net ton in 1934. The most recent sharp increases in the cost of bituminous coals to railroads were during the years 1919 to 1923, inclusive, and such increases were caused to some extent by conditions consequent upon the World War (Pl. Ex. 58; Tr. 515-516).

99. The only available price statistics as to other commodities than coal are wholesale delivered prices, which include transportation charges. The whole-

sale delivered prices of bituminous coal include a much higher proportion of freight than do the wholesale delivered prices of other commodities. According to the Interstate Commerce Commission, Bureau of Statistics, Statement No. 3552, Freight Revenue and Value of Commodities Transported on Class I Steam Railways, 1933, freight charges represented 62% of the delivered value of bituminous coal, but only 11% of the delivered value of all commodities. During the period from 1926 to 1934 the wholesale delivered prices of bituminous coal have had considerably less fluctuation than either the average of all commodities, or the average of all raw materials, or of the following specific commodities: non-ferrous metals, petroleum products, lumber, cotton goods, and hides and skins (Tr. 1569; Pl. Exs. 60, 70-A, 70-B). During the period 1929-1935 retail prices of bituminous coal have had less fluctuation than those of meats, cereals, other foods and the average of all foods, and also of anthracite (Tr. 1571; Pl. Ex. 71).

100. From 1923 to 1925 the all-commodity wholesale delivered price index increased slightly, but the net change from 1923 to 1929 was a decrease of 5.3% and from 1929 to 1933 was a decrease of 29.2%. The following table compares the movement of bituminous coal prices, as shown by the average sales realization f.o.b. mines (which does not include transportation charges) with the movement of the all-commodity wholesale price index (which does include transpor-

tation charges), both series being represented by index numbers starting with 1923.

	1923	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933
Index numbers 1923 = 100.0											
All commodities, wholesale price index*	100.0	97.4	102.9	99.4	94.8	96.1	94.7	85.9	72.6	64.4	65.5
Bituminous coal, f.o.b. mines, average sales realization†	100.0	82.1	76.1	76.9	74.3	69.4	66.4	63.4	57.5	48.9	50.0
Bituminous under all-commodity index	0	—15.3	—26.8	—22.5	—20.5	—26.7	—28.3	—22.5	—15.1	—15.5	—15.5

* Def. Ex. 50.
† Def. Ex. 3A, 50

On this basis in every year after 1923, the mine operators' average sales realization was relatively below the all-commodity index. In 1929, the time of greatest disparity, the mine operators' realization was 28 points below the all-commodity index.

101. A comparison of bituminous coal delivered prices (including transportation charges) with all-commodity delivered charges also shows that bituminous prices fell much more rapidly between 1923 and 1929. Between 1929 and 1933, however, the all-commodity delivered prices fell much more rapidly than the bituminous prices. The figures are as follows:

	1923	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933
Index numbers (1923 = 100.0)											
All commodities, wholesale price index*	100.0	97.4	102.9	99.4	94.8	96.1	94.7	85.9	72.6	64.4	65.5
Bituminous coal, delivered average "wholesale price"†	100.0	87.9	85.1	88.2	88.5	82.5	80.5	78.8	74.6	72.3	73.0
Bituminous under all commodity index	0	—9.5	—17.8	—11.2	—6.3	—13.6	—14.2	—7.1	+2.0	+7.9	+7.5

* Def. Ex. 50.
† Index number of the Bureau of Labor Statistics, quoted by Pl. Ex. 70B for period 1926 to 1933, here extended back to 1923, calculated on base 1923=100.0.

102. As a result of the intense competition and consequent low prices, so far as figures are available, the bituminous coal industry as a whole showed deficits during the period 1924-1933, with the possible exception of 1926. The following table gives the statistics as to net income or deficit of the coal industry, according to Treasury Department data from income tax returns (Def. Exs. 6A and 49):

Year	Bituminous coal industry	Anthracite industry	Bituminous coal and anthracite combined
1917	$203,918,518	•	•
1918	148,846,632	•	•
1919	62,259,694	•	•
1920	249,367,379	•	•
1921	28,889,194	•	•
1922	•	•	$70,851,551†
1923	•	•	67,344,920†
1924	•	•	—49,250,562†
1925	—22,363,497	$—44,359	—22,407,856
1926	•	•	+37,714,000
1927	•	•	—20,303,000
1928	—24,508,000	5,251,000	—19,257,000
1929	—11,304,000	2,422,000	—8,882,000
1930	—42,071,000	8,109,000	—33,962,000
1931	—47,745,000	—1,614,000	—49,359,000
1932	—51,167,000	—16,697,000	—67,864,000
1933	—47,549,000	•	•

• Separate or comparable data not available.
† Prior year's losses deducted.

Throughout the period from 1924 to 1933, many producers were forced into bankruptcy or receivership.

103. Of all the industries in the country, as classified by the United States Bureau of Internal Revenue (91 groups in 1928), only four others, namely, woolen and worsted goods, shipbuilding and repairing, aerial transportation and joint stock land banks showed a net loss during the period 1925 to 1929. (Def. Exs. 49 and 49A.) It is common knowledge that industry generally made profits during this

period. It is common knowledge that, starting in 1930, deficits in business became general.

104. During the period of increasing demand and production the number of men employed in such mining had increased from 271,000 in 1899 to 461,000 in 1905; to 556,000 in 1910; to 557,000 in 1915; to 640,000 in 1920, reaching an all-time high of 705,000 in 1923. After 1923, the number declined to 620,000 in 1924; to 588,000 in 1925; to 503,000 by 1929; 450,000 in 1931 and to 419,000 in 1933. (Def. Ex. 4-A.) It is a matter of common knowledge that from 1923 to 1929 other industries in general were maintaining or increasing their working forces.

105. The average number of days operated by the mines increased from 179 days in 1923 to 219 days in 1929.

106. As a result of the competitive conditions which existed in the industry in the decade following 1923, the method of fixing and correlating wages which had theretofore been employed throughout a very large part of the industry through the instrumentality of wage agreements between associations of producers representing a number of areas and states, on the one hand, and the miners' union, was almost entirely broken down. (Tr. 616-17.) At the beginning of 1923 approximately 70% of the total capacity of the industyr was covered by collective wage agreements. (Tr. 1199.) Such arrangements covered the Central Competitive Field (Illinois, Indiana, Ohio and Western Pennsylvania); the Southwest Interstate Field (Missouri, Kansas, Oklahoma, northern Texas and Arkansas); the states of Michigan, Iowa, Wyoming, and Montana; parts of Washington and Colorado; most of the central Pennsylvania district; northern West Virginia; the

Kanawha, Coal River and New River districts of southern West Virginia, and portions of eastern Kentucky, western Kentucky and Tennessee. (Report of U. S. Coal Com. Vol. III, p. 1050-52.)

107. In a number of important areas, however, including several major districts in southern West Virginia, in Kentucky and in portions of Tennessee, and the States of Virginia, Utah, New Mexico and Alabama the collective method of fixing, and coordinating wages had not been adopted. Various attempts were made by the miners' union, the United Mine Workers of America, to organize these fields. Operators in these areas had successfully resisted these attempts to organize and in so doing many of them used armed guards, relied on the fact of their ownership of land and houses, obtained labor injunctions and used individual or "yellow dog" contracts of employment. (Tr. 1016, 1059-61, 1069, 1162-64 1268-9.) The attempts to organize these fields had frequently been accompanied by acts of violence and by bloodshed. (Tr. 1081-85, 1268-69.) Serious disorders occurred in West Virginia in 1920-21, culminating in a march of several thousand armed men, clashes with mine guards, and hired detectives and State militia, and intervention at the request of the State Governor of 2,000 Federal troops. (Tr. 1082-1085. Hearings before the Committee on Education and Labor. United States Senate. 67th Cong., 1st Sess., West Virginia Coal Fields). Such attempts to organize and the operators' resistance to such attempts were continued after 1923. The attempts of the miners' union, the United Mine Workers of America, to organize these fields were prompted in a large measure by the competitive pressure exerted

by the cutting of wage rates in non-union fields upon the union scale of wages in competing areas. (Tr. 1007, 1010-11.)

108. At or about the time of the execution of the Jacksonville wage agreement, which continued the pre-existing wage rates and became effective April 1, 1924, operators in the unorganized or non-union fields began to cut their prices and necessarily their wage rates. (Tr. 615-616.) This resulted in the gain of a large amount of business at the expense of the operators in the organized fields, and the producers who were operating under collective wage agreements found themselves exposed to a competition which threatened their economic existence. (Tr. 757-758.) This competition fell most heavily upon the union fields immediately adjacent to the centers of non-union production. (Tr. 768-70.) The operators in the Kanawha Valley of southern West Virginia found themselves in the face of this competition unable to pay the Jacksonville wage scale, and in order to improve their competitive position refused to renew or enter into any wage agreement. From the Kanawha Valley the area of non-union or open-shop production spread northward and westward as companies that had signed the Jacksonville wage agreement, finding themselves unable to meet the competition from the adjacent non-union areas, abrogated their wage contracts. (Tr. 1014-15.) These contract abrogations commenced in the year 1924 and continued throughout the period covered by the Jacksonville agreement. They were followed by a series of strikes, many of which were prolonged, strikes which closed down many mines in Ohio, northern West Virginia, and Pennsylvania and the closing of these mines during the strike pe-

riod substantially affected the distribution of coal in interstate commerce. (Tr. 1015-17.) When the Jacksonville wage agreement expired on March 31, 1927, practically all of the remaining union operators in the Appalachian fields, including Pennsylvania and Ohio being unwilling in the face of non-union competition to enter into any agreement providing for a fixed wage scale, offered to the union miners represented by the United Mine Workers of America a plan, known as the Miami Proposal, for a contract in which wages would be based on a sliding scale based on wages in the unorganized fields. (Pl. Ex. 62.) This proposal was rejected by the miners upon the ground that it offered them no protection against having to accept the wages, hours, and working conditions of non-union miners employed under individual contract, in non-union territory. A protracted strike followed the failure of the operators and the miners to make any wage agreement with the result that many mines were closed down in Illinois, Indiana, Ohio and parts of Pennsylvania and in the organized States of the West, during the period of the strike which lasted for periods varying from March 31, 1927, into August, September and October of that year. (Tr. 1018-27.) The conditions in the coal fields of Pennsylvania, West Virginia and Ohio resulting from this strike and the strikes in 1925-6 were the subject of investigation by the Committee on Interstate Commerce of the Senate of the United States (70th Cong., 1st Sess., 1928). The closing down because of this strike of many mines in the States mentioned substantially affected the distribution of bituminous coal in interstate commerce. (Tr. 1028.)

109. After this strike most of the operators in the States of Pennsylvania, Ohio and part of Indiana, reopened their mines on an open-shop basis at lower wage rates, in order that they might be able to meet the competition of the unorganized districts. (Tr. 617, 1028.) Further strikes in the few remaining unionized areas occurred in 1928 and 1932. (Tr. 889-890, 1120-1121.) By 1933 the total tonnage covered by collective agreements had shrunk to 20% of the national output as against 70% ten years before. (Tr. 1199.) East of the Mississippi River the only major areas still operating under collective wage agreements were Illinois, and a part of Indiana. (Tr. 1029.)

110. Unlike the strike of 1919 and the suspension of 1922, these later suspensions caused no national shortage of coal, and there was no marked increase in price. They did, however, cause shifts and diversions of shipments between the various producing states, and laid upon consumers the burden of accumulating large stocks in anticipation of shortage. (Tr. 1533-34.) At the time of the suspension of 1927, production in the State of Illinois dropped from 10,000,000 tons a month before the suspension to a negligible quantity. Individual railroads serving Illinois and adjacent fields were similarly affected, coal loadings on the Chicago, Milwaukee, St. Paul & Pacific System declining from 23,000 cars a month before the strike to approximately 2,900 cars a month during the strike. During the 7 months of the suspension, shipments from Illinois mines averaged 78 per cent below normal, and similar, though less marked de-

clines, occurred in Indiana, Ohio, and other States affected. Meantime, the non-union fields to the south, which were continuing at work, increased their tonnage, the State of Kentucky expanding its output 20 per cent during the same period. The net diversion of business during the suspension from the States affected by the stoppage to the non-union States south of the Ohio River was approximately 15,000,000 tons. (Tr. 1534.)

111. Knowing in advance that the Jacksonville agreement was to terminate on April 1, 1927, consumers of coal were enabled to get through the strike without acute shortage, partly by purchases from the non-union fields and partly by laying in a stock of 75,000,000 tons, 40,000,000 tons in excess of the usual requirements at that season of the year, in anticipation of the stoppage, (Tr. 1534; U. S. Bureau of Mines, Coal in 1927, p. 331.) Mr. Tryon, Chief Coal Economist of the U. S. Bureau of Mines, estimated the working capital tied up in the extra 40,000,000 tons at $200,000,000, and the cost of the operation to consumers in interest charges and physical handling cost at approximately $20,000,000. Accumulation of these stocks had begun in the summer of 1926, and the buying for storage was an auxiliary cause of the sudden rise in the spot prices of that year, the primary cause being a strike of the British miners which created an unusual demand for exports. (Defendant's Exhibits 5 and 5A.; Tr. 1534-35.) The emergency stocks built up before the strike were not reduced to normal during the period of the stoppage, and the excess continued to hang over the market for two years, exercising a depressing

effect on coal prices. The diversions of orders during the suspension tended to encourage a temporary increase in capacity in the southern fields, although the total capacity there operating showed a general decline in the years after 1923 and at no time equalled the 1923 peak. Similar unsettling effects in greater or less degree have attended other widespread suspensions of coal mining, even when there was no such shortage created, such as happened in 1919, 1920 and in 1922. (U. S. Coal Commission Report, Vol. III, p. 1291). The suspensions of 1906, 1908, 1910, 1912, and 1927 all led to sudden and wide fluctuations in the production of coal and in the use of mine capacity and railroad transport facilities in the districts affected (U. S. Bureau of Mines, Coal in 1929, p. 674); and to the accumulation of emergency stocks. (U. S. Bureau of Mines, Coal in 1922, p. 462; U. S. Coal Commission Report, Vol. I, p. 204). Even when the price did not advance sharply, the consumer had to pay the cost of emergency storage, and if the excess stocks were not used during the strike, they acted to depress the market thereafter. The diversion of orders to new channels created an illusory anticipation of profits, led to ill-advised investments in new mines or new equipment, and was one of the factors tending to create or to perpetuate the surplus of mine capacity. (Tr. 1535-37; U. S. Coal Commission Report, Vol. I, p. 204.)

112. As the area covered by collective bargaining contracted, the union wage scale in the northern districts was reduced from $7.50 a day for inside skilled labor to $5.00 a day. The change is illustrated by the union scale in Illinois, which remained $7.50 until after the suspension of 1928, then dropped to $6.10,

and after another suspension in 1932 dropped to $5.00. (Tr. 891-92.) An indication of what these wage scales meant in terms of annual income is given in the table below, constructed from defendant's exhibits 4A and 46.

ILLINOIS

1923	
Scale, inside day labor	$ 7.50
Days operated	158
Calculated annual income	$1,185
1926	
Scale, inside day labor	$ 7.50
Days operated	172
Calculated annual income	$1,290
1929	
Scale, inside day labor	$ 6.10
Days operated	177
Calculated annual income	$1,080
1932	
Scale, inside day labor	$ 5.00
Days operated	112
Calculated annual income	$ 560

The decrease in the Illinois rate from 1923 to 1932 was 33-1/3 per cent; the decrease in days worked was 29.1 per cent; and the decrease in annual income was 52.7 per cent.

113. During the period that the union day wage scale was reduced from $7.50 to $5.00, the corresponding wage scales in the non-union areas suffered a greater reduction. The wages of trackmen are typical of the skilled day wage occupations underground. Hand loaders constitute the principal piecework occupation underground. Piece workers underground constitute 67 per cent of the working force in Pennsylvania and 57 per cent in West Virginia. Day wage workers constitute 33 percent of the force in Pennsylvania and 43 per cent in West Virginia, of whom 22 per cent and 29 per cent, respectively, work underground, 11 per cent and 14 per cent, re-

spectively, working on the surface. (U. S. Bureau of Mines, Coal in 1929, p. 743.) The data in the following table have been taken from plaintiff's exhibit 82B.

	Average daily earnings in Northern Group			Southern Group	
	Illinois	Ohio	Penna.	W. Va.	Kentucky
Trackmen					
1922	$7.62	$7.57	$6.29	$6.38	$5.94
1924	7.49	7.57	6.77	5.23	5.22
1926	7.60	7.48	6.35	5.12	4.84
1929	6.10	*5.16	*5.77	4.82	4.87
1931	6.12	4.36	5.18	4.50	4.46
1933	4.97	3.14	3.40	3.06	2.96
Percent reduction, 1922-1933		-58.5%	—45.9%	—52.0%	—50.2%
Hand loaders					
1922	$9.53	$7.29	$5.79	$6.33	$5.51
1924	8.76	6.63	6.05	5.69	5.40
1926	8.80	6.35	5.75	5.51	4.78
1929	7.03	*4.61	*4.88	4.99	4.77
1931	7.12	3.75	4.23	4.36	4.28
1933	5.06	2.50	2.65	2.84	2.80
Percent reduction, 1922-1933	—46.9%	—65.7%	—54.2%	—55.1%	—49.2%

* Ohio and Pennsylvania were substantially all non-union by 1929.

The largest reductions on a percentage basis in wage rates from 1922 to 1933 occurred in areas which were union in 1922 and went non-union after 1927. Throughout this period wage rates in the non-union mines were, with few exceptions, substantially below those in the union mines. The lower wage rates generally paid, and the proportionately greater wage reductions, in the non-union mines enabled them to capture business from the higher wage union mines, and to increase their operating time. The average number of days worked by the mines in the same groups of states as those contained in the last preceding table were as follows: (Data from plaintiff's exhibit 82B,

except for 1923 which are from U. S. Bureau of Mines, Coal in 1929, pp. 743-4.)

	Average number of days operated in				
	Northern Group			Southern Group	
	Illinois	Ohio	Penna.	W. Va.	Kentucky
1922 (strike year)	120	100	154	143	140
1923	158	150	213	169	152
1924	148	143	180	182	174
1926	172	159	224	247	230
1929	177	201	230	247	222
1931	136	174	169	176	159
1933	141	169	162	196	170
Increase, 1923-1929	+19	+51	+17	+78	+70

114. In all the major fields there was a tendency for working time to increase from 1923 to 1929. The increase in Illinois during this period amounted to 19 days and in Pennsylvania to 17 days, thereas the increase in West Virginia was 78 days and in Kentucky 70 days. In 1923, West Virginia worked fewer days than Pennsylvania; and in 1929 more days than Pennsylvania. In 1923, Kentucky worked fewer days than Illinois and in 1929 more days than Illinois. By these changes southern mine workers obtained steadier employment than northern mine workers.

115. The steadier employment thus obtained by southern mine workers for a time acted to offset the greater reduction in their daily wages, especially during the period of the Jacksonville wage agreement. As Pennsylvania and Ohio went non-union and cut their wage rates, and as Illinois and Indiana were forced to reduce the union scale, further wage cuts were made in the South. Price reductions forced cuts in wage rates a descending spiral. (Tr. 933, 953 Def. Ex. 32A.) The annual earnings

of trackmen and hand loaders during this period were approximately as follows: (Pl. Ex. 82B.)

	Calculated annual earnings in Northern Group			Southern Group	
	Illinois	Ohio	Penna.	W. Va.	Kentucky
Trackmen					
1922 (strike)	$ 914	$ 757	$ 969	$ 912	$ 832
1924	1,109	1,083	1,219	952	908
1926	1,307	1,189	1,422	1,265	1,113
1929	1,080	1,037	1,327	1,191	1,081
1931	832	759	875	792	709
1933	701	531	551	600	503
Percent decrease, 1926-1933	—46.4%	—55.3%	—61.3%	—52.6%	—54.8%
Hand loaders					
1922 (strike)	$1,144	$ 729	$ 892	$ 905	$ 771
1924	1,296	948	1,089	1,036	940
1926	1,514	1,010	1,288	1,361	1,099
1929	1,244	927	1,122	1,233	1,059
1931	968	653	715	767	681
1933	713	423	429	557	476
Percent decrease, 1926-1933	—52.9%	—58.1%	—66.7%	—59.1%	—56.7%

Between 1926 and 1933, the income of the West Virginia loader had been reduced from $1,361 to $557, a decrease of 59.1 per cent while the income of the Pennsylvania had been reduced from $1,288 to $429, a decrease of 66.7%. The West Virginia loader's opportunity to work had been reduced to the extent of 20.6 per cent, but his wage rate had been reduced 48.5 per cent. The Pennsylvania loader's opportunity to work had been reduced to the extent of 27.6 per cent, but his wage rate had been reduced 53.9 per cent.

115a. The wage and income record for the West Virginia trackman and the West Virginia hand loader and for the Pennsylvania trackman and the

Pennsylvania hand loader is summarized below (derived from Pl. Ex. 82B.)

Year	Days Mines Operated	Trackmen Daily Earnings	Trackmen Calculated Annual Earnings	Hand Loaders Daily Earnings	Hand Loaders Calculated Annual Earnings
West Virginia					
1926	247	$5.12	$1,265	$5.51	$1,361
1933	196	3.06	600	2.84	557
Percent decline, 1926-1933	—20.6%	—40.2%	—52.6%	—48.5%	—59.1%
Pennsylvania					
1926	224	$6.35	$1,422.40	$5.75	$1,288
1933	162	3.40	550.80	2.65	429
Percent decline 1926-1933	—27.6%	—46.4%	—61.3%	—53.9%	—66.7%

116. With respect to living costs, the following decreases occurred: According to the figures of the United States Bureau of Labor Statistics, which take 1913 costs as the standard (equal to 100) the retail cost of meats declined from an index number of 180 at the beginning of 1929 to an index number of 100 at the end of 1932; the retail cost of cereals declined from an index number of 165 at the beginning of 1929 to 115 at the end of 1932; the retail cost of dairy products declined from an index number of 150 at the beginning of 1929 to 95 at the end of 1932; the retail costs of other foods declined from an index of 152 at the beginning of 1929 to 90 at the end of 1932; the retail cost of all foods declined from an index of 150 in 1929 to 95 at the end of 1932 (Pl. Ex. 71); the raw materials index declined from a figure of 100 in 1926 to 56 at the end of 1932; and the all-commodities index declined from 100 in 1926 to 64 in 1932 (Pl. Ex. 70).

116a. The combined effects of the discharge of workers and cutting of wage rates resulted in a decrease in the computed annual wage payments of the

industry from $851,000,000 in 1923 to $588,000,000 in 1929. (Def. Ex. 54.) This reduction of $263,000,000 took place at a time when manufacturing industries generally were increasing their total payrolls. (Tr. 1216.) After 1929 wage payments in the coal industry continued to decline, partly through discharge of workers, partly through decrease in operating time, and partly through wage cutting. The total wage payments in 1933 at the scales prevailing before the NRA code are computed at $235,000,000. (Def. Ex. 54.)

117. With the collapse of collective bargaining on a national scale after 1927 uniformity in wage scales gradually disappeared in the non-union fields, and operators in the same fields were paying widely varying wages. (Tr. 1203-06, Def. Exs. 33, 34). In May, 1933, the rates paid to trackmen (a skilled occupation underground) at representative commercial mines varied as follows: (Defendants Exhibits 33 and 33a)

	Number of mines paying daily rates of:					
District	Under $1.50	$1.50 to 1.99	$2.00 to 2.49	$2.50 to 2.99	$3.00 to 3.49	$3.50 and over
Ohio	—	—	—	8	26	2
Western Pennsylvania	—	4	46	31	54	18
Eastern Pennsylvania	—	—	4	13	49	25
Northern W. Va.	—	2	6	51	7	1
Southern Sub. Div. No. 2	2	16	55	51	28	9
Alabama	1	7	6	9	—	—

In the Western Pennsylvania district, the rates paid ranged from $4.00 a day to less than $1.75. Under such conditions, the operator attempting to maintain a reasonable living wage was exposed to competition from wage cutting by other operators within the same field; and one wage cut forced another. Such com-

petition in wage cutting within the limits of the same field tended to develop wherever the wage rate was not stabilized by collective bargaining. (Tr. 1242-44.)

118. The competitive cutting of prices between 1923 and 1933 occasioned a large shift or diversion of shipments of coal from the fields north of the Ohio and Potomac rivers to the fields immediately south thereof. (Tr. 1166-1167.) A competitive trade war was in progress. It expressed itself partly in the controversy before the Interstate Commerce Commission over the lake cargo freight rates and other rates. The readjustments in freight rates made during this decade in general tended to aid the northern group of fields in competition with the southern group. (Tr. 800.)

118a. The intense competition, largely between areas from 1924 to 1927, chiefly expressed itself in price cutting and wage cutting. (Tr. 614-615, Def. Ex. 30, 30A, 32, 32A.) Thereafter, as the machinery of collective bargaining broke down in Pennsylvania and Ohio, competition in price cutting through wage cutting between operators in the same field was added to the inter-field competition. (Tr. 800-801.)

119. The extent of the shift or diversion of business which took place from the northern group of fields to the southern group during this period (1924-1927) is shown by the record of the total shipments originating in the states of Pennsylvania, Ohio, Illinoise and Indiana, designated as Group A in defendants' exhibit 31, and in the states of West Virginia, Kentucky and Virginia, designated as Group B in said exhibit. (Def. Ex. 30, 30A, 31, 31A.) Within the few years prior to 1923, all seven of these states had been increasing their shipments. Penn-

sylvania reached its peak of shipments in 1923, Ohio, Indiana and Illinois each in 1918. The southern group were also increasing their total shipments during this period, but although over the three decades prior to 1914 there had been appreciable gains by the South as against the North (Pl. Ex. 69 and 69A), from 1914 to 1921 there was little change in the relative proportions between North and South (Tr. 1168, Def. Ex. 28, 28A). In 1922 the strike of the union fields caused a sudden decrease in the proportion from the North and an increase from the South. (Tr. 1013, 1171.) But in 1923 the proportion from the South fell back again. (Tr. 1171-1172.) The year 1923 is a suitable starting point against which to compare subsequent shifts in tonnage. It was a year free of any important labor dispute. The railroads were giving improved service, and car shortage entirely disappeared in the second half of the year, leaving all fields free to ship what they could sell. It was a year of general business prosperity and large consumption, a year in which the bituminous coal industry made a profit, and in which wage rates in the non-union fields approached as close to parity with those in the union fields as at any time of record. (Tr. 1178-1179.) In 1923 the proportion of the total shipments originating in the seven states which came from the southern group was 36.1%. Year by year the percentages thereafter were as follows: (Def. Ex. 28A.)

	1923	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933
Percent of shipments from:											
Group A (North)	63.9	59.6	54.7	53.0	46.1	49.6	51.8	52.7	52.6	49.3	49.8
Group B (South)	36.1	40.4	45.3	47.0	53.9	50.4	48.2	47.3	47.5	50.7	50.2
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

120. The proportion of the shipments originating in the South increased very rapidly during the years of the Jacksonville wage agreement from 1924 to 1927 (Tr. 1180-1183). It reached its maximum in 1927 when the strike or suspension at the end of the Jacksonville agreement shut down northern mines and threw additional business during the period of the strike to the southern mines. (Tr. 1171-1172.) Similar diversions of business and shipments, though on a smaller scale, occurred at the suspension of 1928 and that of 1932. (Tr. 1172-1173.)

121. As Pennsylvania and Ohio went non-union and as Illinois and Indiana reduced their union scale, the northern group reduced their prices and recovered a part of the percentage lost to the South during the years of the Jacksonville agreement. (Tr. 1185.) They did not, however, match the price reductions of the Southern fields, and consequently the Southern group retained a large part of the percentage gains made. (Def. Ex. 31A.) Over the 10-year period the proportion from the South rose from 36.1% in 1923 to 50.2% in 1933. A measure of the actual tonnage involved in this shift of business is found by comparing shipments in 1923 and 1929, both years of active business. Between these years shipments from the northern group decreased 52,800,000 tons, and shipments from the southern group increased 50,300,000 tons. These figures represent not the cumulative shift but the total for the single year 1929. (Tr. 1173, Def. Ex. 28, 28A, 31, 31A.)

122. This shift in tonnage from North to South was not due to any expansion of capacity in the South after 1923. Prior to 1923 mine capacity had been growing very rapidly in the southern fields, due

to natural causes, as set forth in finding 74. (Tr. 1545-1546.) Between 1905 and 1913 rapid railroad expansion occurred in the South, which opened to development important new fields. By 1923 such expansion had been completed, and thereafter mine capacity declined in the South, though less rapidly than in the North. (Tr. 1540-1545-1546, 532.) Some part of this shift in tonnage from North to South after 1923 was probably due to the quality of Southern coal. West Virginia coal on the average is superior to Ohio coal. (Tr. 821.) Low volatile coal, such as is produced in a part of southern West Virginia (and also in eastern Pennsylvania) generally commands a higher price than high volatile coal. (Tr. 973.) The shift or diversion of shipments after 1923 from the northern to the southern group was primarily due to a reduction of f.o.b. mine prices in the South more rapidly than in the North, the spread between southern and northern f.o.b. mine prices being substantially increased after 1923. (Tr. 1182, Def. Ex. 31A.) The movement of prices as shown by the average realizations, f.o.b. mine, during the same period is given below. The figures are represented by index numbers, 1923 being 100. (Def. Ex. 31.)

Index numbers of same	1923	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933
Group A (North)	100.0	85.1	80.2	80.2	78.6	72.5	67.9	64.1	58.9	51.9	51.9
Group B (South)	100.0	70.3	65.4	69.2	65.8	60.5	58.9	57.0	48.8	39.9	43.3
Spread	0	—14.8	—14.8	—11.0	—12.8	—12.0	—9.0	—7.1	—10.1	—12.0	—8.6

123. The disparity between the southern and northern f.o.b. mine prices reached a maximum in 1924 and 1925, the first years of the Jacksonville agree-

ment. The price differential narrowed somewhat thereafter and increased to another maximum in 1932. Throughout the period, f.o.b. mine prices at the southern group mines were consistently lower in relation to 1923 than the f.o.b. mine prices at the northern group mines (Tr. 1184-1185, Def. Ex. 31, 31A), although the increase in the lake cargo freight differential in 1927 absorbed a part of the mine price differential on about 9 per cent of the total shipments from the two groups. (Def. Ex. 28A and 29A, Tr. 800.)

123a. There is a close correlation between the spread in f.o.b. mine prices and the diversion of shipments, although some of the diversion was due to strikes in the years 1927, 1928 and 1932 (Def. Ex. 28, 31A). A relatively small change in price differential effects a relatively large shift in tonnage. (Tr. 1182.)

124. The relatively lower southern f.o.b. mine prices after 1923 were due primarily to the greater reductions in wage rates, which the southern employers, operating on a non-union basis substantially throughout this period, were able to effect. The changes in wage rates between the two groups of fields as shown by the Bureau of Labor Statistics sample surveys are summarized below: (Tr. 1191-1199, Def. Ex. 32, 32A.)

Average hourly earnings	1919 Jan.-Feb.	1921-1922 Oct.-Feb.	1924 Oct.-Dec.	1926-1927 Nov.-Mar.	1929 Jan.-Mar.	1931 Jan.-Mar.	1933 Feb.
Group A (North)	$.745	$.894	$.885	$.860	$.707	$.662	$.458
Group B (South)	.647	.819*	.699	.670	.616	.552	.374
Differential	—.098	—.075	—.186	—.190	—.091	—.110	—.084
Percent South is below North	—13.2%	—8.4%	—21.0%	—22.1%	—12.9%	—16.6%	—18.3%

*Does not include Virginia.

The reduction of wage rates in the South had begun immediately after signature of the Jacksonville agreement in February, 1924. (Tr. 1191.) The spread between the average wage rates in the two groups increased from $.075 an hour in the 1921-22 survey to $.186 at the end of 1924 and increased further to $.19 toward the end of the Jacksonville agreement. As the North abandoned collective bargaining or cut the union scale, the differential narrowed. On a percentage basis, the South continued to show a substantially greater spread below the North down to February, 1933 (Def. Ex. 32, 32A).

125. The differentials between north and south are broadly similar for wages of coal miners and for wages of labor in other industries. Average hourly entrance wage rates paid common labor and average hourly wage rates paid textile workers (skilled laborers) in the south Atlantic and east south central states (Delaware, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama and Mississippi) have, during the period of the compilation of wage statistics by the Department of Labor since 1926, been in the neighborhood of two-thirds of the wage rates paid for the same classes of labor in the east north central and middle Atlantic states (Ohio, Indiana, Illinois, Michigan, Wisconsin, New York, New Jersey and Pennsylvania) (Pl. Exs. 73, 73-A, 74—74-E). Wage rates for coal miners during the same period in the two districts were, until the adoption of the National Recovery Act, roughly in the same ratio, except at the commencement of the period when a proportion-

ately higher union scale was in effect in the northern states (Tr. 1187-1190; 1039-1042; Def. Exs. 32, 32-A, 21). On July 1, 1933, the average entrance rate for common labor in important industries requiring considerable numbers of common laborers in the South Atlantic Division as a whole was 42 per cent below the average for the Middle Atlantic Divisions as a whole. (Pl. Ex. 73.) The average rate for West Virginia was 8 per cent under the average for Pennsylvania. (Def. Ex. 53.) On the same date, the average rate for the East South Central Division as a whole was 53 per cent below the average for the East North Central Division as a whole. (Pl. Ex. 73.) The average for Kentucky was 28 per cent below Illinois, 6 per cent below Indiana, and 20 per cent below Ohio. (Def. Ex. 53.)

126. Between 1923 and 1933 there was also a shift and diversion of tonnage of coal loaded for shipment from certain groups of coal-originating railroads to other groups. The shift was due to the same causes discussed in connection with the preceding findings. The following statement shows the percentage of the total tonnage of bituminous coal loaded for rail shipment in the Appalachian district north of Alabama on the railroad system indicated:

Railroad System	1923	1926	1929	1933
Baltimore & Ohio R. R.	16.1%	14.0%	13.6%	11.1%
New York Central R. R., including P. & L. E.	6.9	4.9	4.4	5.6
Pennsylvania R. R.	22.2	17.9	16.2	15.3
Other North roads	18.4	15.6	16.5	16.4
Total North roads	63.6	52.4	50.7	48.4
Chesapeake & Ohio R. R.	11.6	16.9	17.2	19.4
Louisville & Nashville	6.8	8.6	8.8	8.1
Norfolk & Western Ry.	9.6	12.8	13.8	13.7
Other South roads	8.4	9.3	9.5	10.4
Total South roads	36.4	47.6	49.3	51.6
Grand Total	100.0	100.0	100.0	100.0

From 1923 to 1933 the Baltimore and Ohio, New York Central and Pennsylvania systems lost heavily in percentage of total coal loaded in the Appalachian area, and the Chesapeake & Ohio, Louisville and Nashville and Norfolk and Western systems correspondingly gained. (Def. Exs. 17, 18, 19.)

The Practice of the Industry with Reference to Collective Bargaining

127. It has been customary in the bituminous coal industry for large groups of producers operating in competing areas in several states to associate themselves for the purpose of bargaining collectively with representatives of their employees, organized in an industrial trade union on a national scale, namely the United Mine Workers of America, concerning wages, hours and other conditions of employment. The main purpose of negotiating such agreements to cover large producing areas has been to fix, stabilize and correlate wage rates and other conditions affecting the same throughout such areas and to avoid interruptions of work caused by labor disputes.

128. Beginning with the year 1898, the basic collective wage agreement of this character was negotiated between an association of practically all of the producers operating in the Central Competitive Field (Illinois, Indiana, Ohio and the western part of Pennsylvania) and representatives of their employees namely the United Mine Workers of America. Taking the wage rates fixed in this fashion in the Central Competitive Field, wage rates correlated to such basic rates on the basis of competitive conditions were then fixed by similar collective agree-

ments made between groups of operators and the United Mine Workers of America, as representatives of their employees, in adjacent unionized areas. (Tr. 368-70, 988-91.) This method of fixing and correlating wage rates was continued and expanded until 1922, when approximately 70% of the industry was operating under such agreements.

129. After the expiration of the Jacksonville wage agreement in 1927, this system of fixing wages was, because of price competion and wage rate cutting by non-union producers, broken down almost entirely excepting in the state of Illinois, a part of Indiana, and a few other areas of minor importance. (Tr. 617.) Between the years 1927 and 1933 practically the entire industry was engaged in a demoralizing competitive warfare in which cutting of wage rates followed price-cutting in a continually descending spiral. (Tr. 618.) Upon the passage of the National Industrial Recovery Act the system of fixing and correlating wages by collective bargaining agreements as formerly practiced, was established upon substantially a national scale. (Tr. 1039-41.) Since October, 1933, wage rates throughout practically the entire industry have been fixed, and correlated by a basic collective agreement (Appalachian) executed by and between representatives of the producers in the industry by tonnage on the one hand, and by representatives of over 70 per cent of the workers employed in the industry on the other, such agreement then being supplemented by similar agreements in practically all other producing areas. (Tr. 1039-40, 630.)

Labor Disputes

130. The strikes or other labor disputes which have occurred in the bituminous coal industry are of three general types: (1) strikes caused by attempts on the part of employees to bargain collectively concerning wages, hours and conditions of employment and the refusal of their employers so to bargain; (2) strikes or, more properly speaking, suspensions, such as those that have occurred at intervals at the expiration of existing wage contracts, the parties continuing to bargain collectively but unable to agree on the terms of renewal (Tr. 410-411); (3) strikes occasioned by either employers or employees breaching existing wage agreements. (Tr. 1014, 616-17.)

131. Strikes of the kind first mentioned have generally been basically caused by dissatisfaction of the miners with working conditions at the mines such as low wages, poor living conditions, disputes about the right to checkweighmen, by the various practices by means of which employers have sought to prevent collective action by their employees, and by and the desire of the miners' union to prevent undercutting of the wage rates previously established by collective bargaining in adjacent competing fields. (Tr. 1009-1010.) Such strikes have often been accompanied by acts of violence by both parties, in some cases necessitating the interference of state militia or Federal troops. Non-union employers generally have sought to prevent the unionization of their mines, and many of them in so doing have resorted to the use of individual or "yellow dog" contracts of employment, to anti-labor injunctions, to the employment of armed guards, and have attempted to prevent

their employees from taking any sort of collective action through the control of company-owned towns and company-owned houses. (Tr. 1000-01, 1950-51.)

132. Strikes or suspensions of the second type have been due to the failure of employees and employers to agree on the terms of renewal at the expiration of the term of wage contracts. (Tr. 1138.) A main cause of such strikes or suspensions have been the fact that unionized producers have felt themselves unable to meet the wage proposals of the employees because of cutting of prices and of wage rates by producers not bound by wage agreements. (Tr. 410-11.) Such strikes or suspensions amount to a cessation of employment while a new agreement is being negotiated and generally have not been accompanied by acts of violence.

133. Strikes of the third type have been occasioned more often by the abrogation of wage contracts by producers than by the breach of wage contracts by employees. The primary cause of such abrogations by producers has been the pressure put upon them by cutting of prices and wage rates by producers not operating under wage contract. (Tr. 768-70, 801, 1014-15 616-17.) Strikes of this type have often been accompanied by serious disorders and acts of violence and have at times necessitated the use of armed guards and troops. (Tr. 1015-17.)

134. Strikes of the first type, involving recognition of the union, are illustrated by the seven district strikes before the World War listed in finding 83 and by the strikes in Alabama (1920) and in Southern West Virginia (1920-21), both of which were accompanied by martial law and use of troops. (Pl. Ex. 66, U. S. Bureau of Mines Coal in 1919-20-21 p. 506-507.)

134. Strikes or suspensions of the second type, affecting simultaneously mines in several States, have occurred in 11 years out of the 35 years covered by the statistical record. The numbers of men involved and the time lost in labor disputes of all kinds, including local and district strikes, in these 11 years are shown below. (Pl. Ex. 66, 80. Def. Ex. 4A).

Year	No. of men on strikes, etc.	Man-days lost on account of labor disputes	Average days lost: Per man on strike	Average days lost: Per man employed in industry
1904	75,533	3,348,727	44	8
1906	211,304	13,242,905	63	28
1908	145,145	5,449,938	38	11
1910	215,640	19,234,785	89	35
1912	159,098	5,613,830	35	10
1914	135,605	10,833,924	80	19
1919	418,279	15,525,857	37	25
1922	460,589	53,874,017	117	78
1927	172,844	26,515,867	153	45
1928	50,742	4,204,404	83	8
1932	62,867	7,552,468	120	19

Another general suspension occurred October 1, 1935, involving 90% of the miners in the industry (419,000 in 1933) and lasting one week. (Tr. 629, 1047.)

135. Various other major industries, including building trades, clothing and textiles, have had as many or more labor disputes (in numbers) during the period 1919 to 1933 as the bituminous coal industry (Tr. 1578-1579; Pl. Ex. 75, 75A). The numbers of such disputes indicate nothing of their relative size, or their effects upon commerce.

136. During the period 1924-1933 only 3.1% of the possible 308 working days have been idle on account of labor disputes in the bituminous mining industry, whereas 36.7% have been idle for all other

causes (Pl. Exs. 76, 76A, 76B). During that period the proportion of days idle on account of labor disputes has been as follows: in 1924—7 out of 137; in 1925—2 out of 113; in 1926—1 out of 93; in 1927—45 out of 117; in 1928—8 out of 105; in 1929—less than ½ out of 89; in 1930—2 out of 121; in 1931—3 out of 148; in 1932—19 out of 162; in 1933—9 out of 141. (Tr. 1581; Def. Ex. 4A; Pl. Ex. 77, 77A).

137. During the period 1924-1933 while Ohio has had an average number of 33 days idle per year per man employed in bituminous coal mining, Illinois an average number of 26.6 days, Indiana 19.8 days and Pennsylvania 8.4 days, West Virginia has had an average number of only two days and all other states an average number of 4 days (Tr. 1581; Pl. Exs. 78, 78A). During this period many mines in West Virginia were operating under so-called "yellow-dog" contracts and anti-labor injunctions and were otherwise resisting attempts of union organizers to enter the West Virginia field. (Tr. 1164, 1161, 999, 1000.)

138. From 1921 through 1933 on the basis of a 308-day year the number of days lost per man on account of strikes as compared with the number of actual working days and the number of days idle for all other causes was as follows:

Year	Average number of days:* Idle on account of labor disputes	Idle on account of other causes	Worked
1919	25	88	195
1920	6	82	220
1921	3	156	149
1922	78	88	142
1923	2	127	179
1924	7	130	171
1925	2	111	195
1926	1	92	215
1927	45	72	191
1928	8	97	203
1929	less than ½	89	219
1930	2	119	187
1931	3	145	160
1932	19	143	146
1933	9	132	167

* Def. Ex. 4A.

139. Reductions in wages do not necessarily cause strikes (Tr. 1409-1410). Demands for reduction of wages by union employers who declared they could not meet competition of non-union employers were the immediate issue in the suspensions of 1922, 1927, 1928 and 1932 (Tr. 1012, 1014, 1015, 1018-27, 616-17, 890-91, 742).

139a. Strikes of all three types have frequently occasioned intervention, investigation or mediation by the Federal Government.

140. Generally strikes and suspensions have had the immediate result of closing the mines affected and preventing the shipment of coal therefrom. This has usually involved a diversion or dislocation of commerce, in that competition with other mines by the mines affected was stopped and the business formerly enjoyed by them was shifted, in part at least, to other mines or fields. It is in the public interest for the consumer to be able to obtain coal from mines not on strike when other mines are on strike. (Tr. 1381).

141. The carriers have been called on to maintain facilities sufficient to handle extraordinary peaks of demand in anticipation of suspensions, which facilities have been unused during the periods between suspensions. With respect to other effects of strikes see findings 83-89 and 110-111.

Conditions in the Mining Communities

142. A number of social workers who investigated the coal fields from 1931 to 1933 testified to the conditions observed by them. (Tr. 1427, 1448, 1430-31, 1349, 1350; 1446-1448.) This testimony covered observations and conditions in the five largest bituminous coal counties in Pennsylvania, ranked according to number of miners employed in 1931; in the first, fourth, fifth, sixth, seventh, and eighth largest counties of West Virginia; in the four largest counties of Kentucky; in the largest county of Tennessee; in the first, third, and fourth largest counties of Illinois; and in seven other coal-mining counties in these same States. (Def. Ex. 55.) The living standards of miners and families in these areas at that time were found to be very low. Diet was meager and a great many families were under-nourished. Milk was not available for the children. (Tr. 1432-33, 1456-57.) The clothing of many of the miners and their families was dilapidated and time-worn. (Tr. 1353-1354, 1433-1435.) House furnishings were paltry. (Tr. 1353.) The living conditions of the employes at the larger and better operated mines were upon a considerably better plane. (Tr. 1361, 1595-1599, 1605.), though many bituminous coal-mining communities were so impoverished as to be of particular concern to agencies engaged in relief and social work, and in

1931, two years before the Federal Government assumed responsibility for provision of depression relief, President Hoover asked The American Friends Service Committee to undertake a program of child feeding in the bituminous coal area. (Tr. 1346.) This child feeding program was conducted in 640 schools scattered through 40 counties in six coal mining states. In 1923 the United States Coal Commission caused detailed studies to be made of living conditions in 880 bituminous mining communities, as a result of which that Commission found somewhat similar living conditions to exist.

143. Over one-half of the miners engaged in the industry are piece workers and are paid on the basis of the weight of coal mined. It has been a common practice for non-union producers to pay on the basis of weights as estimated by them, and prior to October, 1933, a great many mines did not have scales with which coal loaded by the piece workers might be weighed. Among the mines where scales were provided for this purpose there were a large number of non-union fields where the mine workers were not permitted to check the weights as determined by the operators. Some operators took advantage of these conditions to short-pay their piece workers. As a result in some areas there was a general feeling on the part of the workers that they were unfairly treated and there was strong general demand on the part of the workers for adequate scales for weighing coal and for check-weighmen employed and paid by the workers to check the weighing. (Tr. 1280-1281, 1056-1058.) The evidence in this case does not justify a finding that said practice was general. (Tr. 1099, 1159,-1160, 1163.)

144. It was a not uncommon practice for operators in non-union areas to require their employees to trade at company stores and to live in company houses and to provide in the leases covering such houses that the employee would be subject to immediate eviction without notice in case of discharge. As a result there was a general feeling on the part of such employees that if they attempted to organize in opposition to the wishes of their employers, they might be evicted immediately from their houses. (Tr. 1059-1061.) It was also not an uncommon practice for operators in non-union areas to require their employees to sign individual contracts of employment containing provisions under which the employee undertook not to join a labor organization. (Tr. 1000-1001, 1060-1061.) All of these conditions have tended directly to cause unrest and dissatisfaction on the part of the mine workers. Just prior to the passage of the National Industrial Recovery Act, approximately only 20 per cent of the mine workers employed in the industry were organized for collective bargaining purposes. (Tr. 1199.) Within six weeks after the passage of that Act over 90 per cent of the mine workers had become members of a labor organization for such purpose. (Tr. 1039.)

Efforts to Improve Competitive Conditions and to Stabilize the Industry

145. As early as 1925, operators began to search for a method of avoiding the effects of the downward trend of prices and profits and a plan for a central sales agency was considered by the producers in the

smokeless fields. In 1927, these producers considered a plan for merging all of the operating companies in that field. (Tr. 975.) In 1929, a committee was appointed in this area to investigate the situation. (Tr. 975-976.) In 1931, the Governor of Kentucky called meetings of the coal operators and a meeting of the Governors of other coal producing states in an effort to stabilize conditions throughout those sections. (Tr. 813, 925-926.) These conferences achieved no tangible results. The Governor of West Virginia then asked the National Coal Association to consider the question. (Tr. 927.) As a result a plan for the formation of voluntary regional selling agencies was formulated and Appalachian Coals, Inc. was formed. (Tr. 672, 927.) At the time many operators hoped and believed that these selling agencies would stabilize the industry. (Tr. 874, 814.) No selling agencies went into operation until the middle of 1933, pending the decision of the Supreme Court in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344. After that, Appalachian Coals, Inc., functioned and two additional agencies were set up in Ohio. In the short period of time during which these agencies functioned prior to the N.R.A., they succeeded in improving conditions somewhat but were unable to maintain prices because of competition from other producers in the same and other areas who did not become members. (Tr. 674, 815, 871, 929, 942.) Shortly after the passage of the National Industrial Recovery Act, producers of approximately 95 per cent of the national tonnage joined in the submitting of the Code of Fair Competition for the Bituminous Coal Indus-

try which was subsequently approved under that Act. (Pl. Ex. 59, p. 326.)

D. The Industry Under and Since the NRA Code

146. On September 18, 1933, the President approved the Code of Fair Competition for the Bituminous Coal Industry under the National Industrial Recovery Act. That Code provided for the fixing of minimum prices, prohibited certain unfair trade practices substantially the same as those listed in Part II of Section 4 of the Bituminous Coal Conservation Act, and guaranteed to employees the right to bargain collectively with representatives of their own choosing, to select checkweighmen, and to live and trade at other than company houses and stores. (Pl. Ex. 59.) Collective wage agreements were promptly negotiated to cover most of the coal fields and the terms of these agreements as to minimum wages and maximum hours were written into the Code. (Tr. 1041.) The NRA Code, with its amendments, was in effect until May 27, 1935. Up until January, 1935, it was generally observed. (Tr. 678-679, 957.) During that period the Code operated successfully and was responsible for a marked improvement in the condition of both the operators and the miners. (Tr. 341-346, 622-623, 867, 953, 942, 957, 1289-1290.) After that it began to break down, as violations increased. (Tr. 679, 693, 855, 866-867.)

147. In May, 1933, the average rate of pay (as shown by a survey by the Coal Section of the Division of Research and Planning of the National Recovery Administration) for trackmen (a skilled

occupation underground which takes the basic day rate) ranged from $1.50 to $4.00 in Pennsylvania, with most mines paying from $2.00 to $3.50, and from $1.40 to $4.00 in the high volatile fields in Southern West Virginia, Virginia, and Eastern Kentucky, with most mines paying between $1.75 and $3.25 (Def. Ex. 33.) The basic wage established by the Code, as originally approved, was $5.00 for Illinois, $4.60 for Pennsylvania and Ohio, and $4.20 for Southern West Virginia and Eastern Kentucky, on an 8-hour day basis. Correlated rates were established for all regions. (Pl. Ex. 59.) On April 1, 1934, the maximum number of hours per day was reduced to 7 and the basic wage rates raised to $5.00 in Pennsylvania and Ohio, and $4.60 for Southern West Virginia and Eastern Kentucky. (Tr. 1041.) Corresponding increases were made in piece work rates paid to tonnage men.

148. The increase in earnings of the mine workers under the NRA Code is illustrated by the workers in West Virginia. At the rates prevailing in early 1933 before the Code, the average West Virginia trackman had earned $3.06 a day. At this rate his working time of 196 days in 1933 would yield an annual income of $600. (Pl. Ex. 82b.) Under the Code, his wage was increased after April 1, 1934 to $4.60 a day. Working time in West Virginia in 1934 again averaged 196 days. (Def. Ex. 51.) His income at the final Code wage would be $902 a year, an increase of 50 per cent in annual income over pre-code conditions. A similar increase in income was obtained by West Virginia piece workers or tonnage men.

149. The average mine realization under the Code rose as follows: (Def. Ex. 37.)

	Jan.-Sept., 1933	Nov., 1933-March, 1934	Apr., 1934 thru Jan., 1935
Division I (the entire Appalachian area)	$1.03	$1.639	$1.919
Division II (Ill., Ind., and Iowa)	1.36	1.509	1.629
Division III (Alabama)	1.49	1.91	2.254

150. During the period from October 1, 1933 to January, 1935, there was marked improvement in the financial position of coal operators. The losses characteristic of preceding years were reduced if not overcome. (Tr. 623, 811.) Cost determinations for the 10 month period April, 1934 to January, 1935, show the following result for Code Divisions I and II, which Divisions produce approximately 89 per cent of the Na tional output. (Def. Exs. 37a, 46.):

Average mine realization	$1.86
Average total cost	1.83
Margin	.03

The cost figures do not include interest on indebtedness.

151. The profits and losses of the Carter Coal Co. in 1934 and in the 5 years preceding are shown below: (Def. Ex. 47.)

Year	(1) Net profit or loss before interest and Federal Income tax*	(2) Deduct interest charges	(3) Net profit or loss before Federal income tax (1)-(2)*
1929	+$135,561	$704,184	—$568,623
1930	+117,611	766,269	—648,658
1931	—417,673	811,043	—1,228,716
1932	—595,487	851,980	—1,447,467
1933	—254,452	187,721	—442,173
1934	+401,949	24,961	+376,988

*A plus sign indicates profit; a minus sign, loss.

152. During this period there was a slight increase in capacity primarily due to the opening of a number of small wagon or truck mines. (Tr. 341, 543.) The amount of this increase in capacity was not significant. (Tr. 543.) An increase in price does not necessarily bring about an increase in mining capacity. Whether or not it does depends upon whether the price increase results in a profit and how substantial such profit is. This in turn depends upon whether prices rise more rapidly than costs. It is estimated that a minimum price schedule fixing average mine realization at average cost of production will not result in any increase in capacity. (Tr. 835, 638.) It is also estimated, based upon the NRA experience, that a profit margin of 5c a ton for the industry over a period of two or three years might cause an increase in capacity of 5%. (Tr. 543-547.)

153. The prices fixed under the Code began to break beginning about January, 1935, because of a lack of enforcement. (Tr. 678-679, 693, 855, 866-7, 957.) Noncompliance with the price provisions by some 10 to 20% was sufficient to cause the breakdown (Tr. 961-962). Prices began to decline before May 27, 1935. After that date, spot prices declined rapidly to levels as far below cost as the prices in the spring of 1933 (Tr. 834-835, 938-939). The average realization did not fall so rapidly and has not, as yet, reached such depths. This is largely because of pre-existing long term contracts made at Code prices, many of which will not expire until March 31, 1936. (Tr. 812-813.)

154. The cost of operation of the NRA Code were assessed upon the Code members. Under the

National Industrial Recovery Act the costs paid by the Carter Coal Company for administering the Coal Code under that Act were approximately $20,000, being equivalent to about $1,000 per month during the life of that Code (Tr. 261).

155. Prices were originally fixed under the NRA Coal Code for the coals produced at the Caretta mine of the Carter Coal Company which resulted in a substantial shrinkage of the volume of sales from that mine and in the loss of customers because the minimum set was so high that the company found it difficult to sell its coal in the opinion of Mr. Carter. Long-term contracts covering the sale of Caretta coal expired during the period of the National Industrial Recovery Act Code and the Company found it impossible to renew its contracts at the prices fixed under such Code. The prices were subsequently revised by the Code Authority to the satisfaction of the Company. Since the expiration of the NRA that mine has regained some of its customers but not all (Tr. 303-306).

156. While the NRA Code was being formulated in September, 1933, producers in the Appalachian area (from the states of Pennsylvania, West Virginia, Kentucky, Tennessee, Ohio, and Alabama), negotiated with the United Mine Workers of America a wage agreement, known as the first Appalachian Agreement. (Tr. 627-628, 1039-1041.) This Agreement was renewed on April 1, 1934 for a period of one year. (Tr. 629, 1042.) Prior to April 1, 1935, prices began to decline. (Tr. 957.) The operators and the employees were unable to agree on terms for a new agreement to become effective

upon the expiration of the prior one. A suspension of operations in almost the entire coal industry was threatened, but was postponed several times at the request of the President of the United States. (Tr. 1042.) When the representatives of the operators and employees finally found themselves unable to agree, a suspension took place in September, 1935, (Tr. 628-629) closing down practically all of the bituminous coal mines in the United States for a week, and reducing the amount of coal produced and shipped from approximately 9,000,000 tons during the preceding week to approximately 1,000,000 tons. (Tr. 762.)

157. Large sized or lump coal has no greater heating value than fine or slack coal. (Tr. 1147.) The costs of production of large and small sizes are the same, since they both result from the same producing and screening operations. (Tr. 875.) The cost of screening and cleaning coal is not more than 2 to 5 cents a ton. (Tr. 882.) Generally the large sizes are better fitted for domestic household use, and the slack is better fitted for industrial consumption. Generally slack is sold at prices below the average cost of production of all sizes, in part because of the buying power of the large industrial consumers purchasing in quantity as compared to that of the householder purchasing small amounts; in part because the producer is anxious to move the fine coal in order that he may produce more sized coal, and in part because of the relatively restricted market for the fine coal. (Tr. 306-309, 1147, 817.) Producers attempt to make up the differences by selling domestic coal at an increased price above the cost of producing

all the sizes. (Tr. 308.) In August, 1933, the differential between domestic coal and slack coal averaged $1.16 per ton. The fixing of minimum prices under the National Industrial Recovery Act narrowed the spread to $.94 per ton in August, 1934. (Tr. 1147-1148, 811.)

XV. Coal Resources

158. The total reserves of coal and lignite of all grades are placed by the Geological Survey at 3,535 billion tons. (Tr. 522, 1472.) At 1929 rates of production and losses in mining, without allowing for the possibility of increase in consumption, this would suffice for 3,500 years. At 1934 rates the period would be longer. (Tr. 523-525.) The great bulk of these reserves consist of coal so low in grade, so deeply buried, so inaccessible, or in such thin beds that it has no present value and could be produced only at a great increase over present cost. (Tr. 525, 569, 1472.)

159. The geological distribution of the estimated 3,535 billion tons of coal reserves of the United States, is given by the Geological Survey as follows: 560 billions in the Appalachian Fields stretching from Pennsylvania to Alabama; 526 billions in the interior provinces including Illinois, Indiana and a tier of states extending from Iowa south into northern Texas; 23 billion tons of low grade lignite in the Gulf States of Texas, Louisiana, Arkansas, and Mississippi; 1,294 billions in the plains from North Dakota west into Montana and other Rocky Mountain states, the great bulk thereof being lignite and sub-bituminous coal; 1,066 billions in the Rocky

Mountain states, largely low grade coal; 64 billions in the State of Washington with trifling amounts in other Pacific Coast states. (Tr. 559-560.)

160. Present mining generally is concentrated on the richest and most accessible deposits, many of which are relatively short-lived. It is estimated that at 1929 rates of production the life of the Connellsville coking coal is from 20 to 30 years (Tr. 1480); of the Pittsburgh bed in Pennsylvania, 100 years; of the beds of present workable thickness (36 inches or more) in the smokeless or low-volatile field of southern West Virginia, 85 years. (Tr. 525.) Veins of less than 18 inches are commonly mined in Europe today (Tr. 1493).

161. It is estimated that the total tonnage of 1,440 billions, classified by the Geological Survey as bituminous coal, at the 1929 rate of production, not including semi-bituminous and allowing for loss in mining, will last approximately 2,000 years and would last longer at the 1934 rate of production. (Tr. 528.) It is also estimated that the life of the bituminous coal of good quality and workable thickness and position which could be extracted at reasonable cost under present conditions is 300 years. (Tr. 1473.) It is estimated that the anthracite reserves are 29% exhausted but that they will last from 100 to 200 years (Tr. 528, 393). The real problem of conservation is not absolute exhaustion of the mineral, but increase in cost through the depletion of the richer deposits. (Tr. 1474-1475.)

XVI. Waste.

162. The intense competition [redacted] periods of low prices has caused a waste of coal resources (Tr. 1489-

1491, Def. Ex. 43B). Wastes of the beds now being mined are substantial. In Europe the average extraction is 90 per cent. In America, according to an engineering study by the United States Coal Commission and the Bureau of Mines in 1923, the average extraction was 65.3 per cent. The average loss was 34.7 per cent, of which close to 20 per cent was classified as avoidable and 15 per cent as unavoidable. At the 1923 rate, in a year of normal production of 500,000,000 tons, the avoidable loss would amount to 150,000,000 tons. (Tr. 1482-1483.) Mining methods have improved since 1923 despite decreased prices (Tr. 1495). Less wasteful methods are not necessarily more expensive. (Tr. 1501.)

163. In the State of Pennsylvania the average loss in the 1923 survey was 28 per cent, of which 13 per cent was unavoidable and 15 per cent was avoidable. (Tr. 1483-1486.) In the Pittsburgh Coal seam the avoidable losses range from 9 per cent to 15 per cent. (Tr. 1485.) Since 1923, however, there have been great additional losses not covered by the survey of that year, through the premature abandonment of mines before exhaustion. In many cases such abandonment results in the crushing and burying of the workings and the isolation of irregular areas of unmined coal in such way as to make subsequent recovery possible, if at all, only at very great increase in cost. (Tr. 1498.) Losses due to premature abandonment are not accurately known. Such wastes are largely connected with the financial condition of the industry. (Tr. 1489.)

164. In 1934, the Mineral Policy Committee of the National Resources Board, reported that: "The causes of the excessive waste attending the

mining of our coals are complex, but the great underlying cause is destructive competition . . . In many cases the prevention of loss, while entirely possible from the point of view of engineering, involves a substantial increase in cost . . . But there remain many other losses which can be avoided with slight additional expense as the practice of the better companies in normal times has already shown. Prevention of such losses depends on relieving the conditions of poverty which have surrounded the industry. The members of this committee who have given most thought to the question are convinced that the necessary first step in reducing the waste of coal in mining is to aid the industry in establishing itself on a stable and profitable basis." (Defendants' Exhibit 43B.; Tr. 708.)

XVII. Production and Distribution of Miscellaneous Commodities.

165. Iron ore is produced commercially in 10 States and 94% thereof is produced within 3 States (Minnesota, Michigan and Alabama) (Pl. Ex. 81 F-H); copper is produced commercially in 18 States and 79% thereof is produced within 4 States (Montana, Utah, Arizona and Michigan) (Pl. Ex. 81 I-K); salt is produced commercially in 13 States and 80% thereof is produced within 4 States (Kansas, Michigan, Ohio and New York) (Pl. Ex. 81L-N); oranges are produced commercially within 5 States and 98% thereof are produced within 2 States (California and Florida) (Pl. Ex. 810-Q); motion pictures are produced commercially within 16 States and 95% thereof (by cost) are produced within

2 States (California and New York) (Pl. Ex. 81R-T); motor vehicles (not including motorcycles) are produced commercially in 23 States (assembling plants being treated as manufacturing establishments) and 67% thereof (by value) are produced within 4 States (Michigan, California, Ohio and Indiana) (Pl. Ex. 81V-W).

166. The practices described in paragraphs 2 to 12, inclusive, of subsection (i) of Part II of Section 4 of the Bituminous Coal Conservation Act of 1935 existed throughout the bituminous coal industry prior to 1933 and now exist. Such practices, however, are not and have not been engaged in by the reputable firms, and are not and have not been the general practice. Similar practices existed and exist in other industries.

FINDINGS OF ULTIMATE FACT

From the foregoing facts, the Court concludes as follows as to the ultimate facts in the case:

167. This cause involves a substantial adverse controversy.

168. This proceeding was brought promptly on August 31, 1935; was brought in good faith; and plaintiff had reasonable ground to contest the regulatory provisions of the statute; and but for the time required by the Government officer defendants to prepare for trial, the case could have been heard and determined before November 1, 1935, the date on which the tax began to accrue.

169. Should the Carter Coal Company join the Code, it would be compelled to cancel existing contracts, and would be compelled to pay its proportionate share of administering the Code.

170. The production of bituminous coal is a local activity carried on within the borders of individual States.

171. Coal is an innocuous commodity, the transportation of which in interstate commerce is not harmful to that commerce or to the public health, safety, morals or general welfare.

172. Bituminous coal is the nation's greatest and primary source of energy. Its use is vital to the public welfare. It is of the utmost importance to the industrial and economic life of the nation and to the health and comfort of its inhabitants that the distribution of bituminous coal in interstate commerce be regular, continuous and free from interruptions, obstructions, burdens and restraints.

173. The production of bituminous coal in the United States at the present time is dependent upon the existence of adequate transportation facilities and the presence at the mine of sufficient railroad cars as the coal is produced. The operations of the existing railroads of the country are dependent upon the production and distribution of bituminous coal.

174. Bituminous coal is generally sold f.o.b. mine and the predominant portion of it is shipped outside of the State in which it is produced. Such sales of coal f.o.b. mine for shipment in interstate commerce are sales in interstate commerce and interstate commerce transactions.

175. The distribution and marketing of bituminous coal within the United States is predominantly interstate in character, and the interstate distribution and sale and the intrastate distribution and sale of such coal are so intimately and inextricably connected, related and interwoven that the regulation of interstate transactions of distribution and sale cannot be accomplished effectively without discrimination against interstate commerce unless transactions of intrastate distribution and sale be regulated.

176. Small variations in the mine price of bituminous coal as between mines in different producing areas and states may cause large variations in the shipments in interstate commerce of coal from such producing areas and states, and small variations in the mine price of bituminous coal as between mines in the same state may cause large variations in the shipments of coal from such mines to points of consumption in the same state or in other states.

177. The f.o.b. mine price at which bituminous coal is sold in interstate commerce directly affects interstate commerce in bituminous coal.

178. For many years the business of distributing and marketing bituminous coal in interstate commerce has been carried on under conditions of unrestrained and destructive competition.

179. For many years the competitive conditions existing in the bituminous coal industry have led to destructive price cutting, and such price cutting has been carried to such an extent that ever since the year 1924, with the exception only of the N.R.A. code year, 1934, and possibly of 1926, the average price realized by producers of bituminous coal throughout the United States has been less than the average cost of production.

180. Such destructive price cutting has directly burdened and restrained interstate commerce in bituminous coal and has caused substantial dislocations to and diversions of the normal flow of such commerce.

181. Such unrestrained and destructive competitive conditions have occasioned many unfair competitive practices including those set forth in finding 166, in the distribution and marketing of bituminous coal in interstate commerce, and such practices have served to further demoralize the industry and to place added burdens and restraints upon interstate commerce in bituminous coal.

182. Labor costs of mining bituminous coal are a much greater percentage of total costs than is the case in any other large industry. In the bituminous coal industry cutting of wage rates is the predominant and most effective method of gaining competitive advantages and under the conditions which have existed in the industry has proven to be a destructive method of competition and has tended to create a great disparity in wage rates between producers operating in different states and producers operating in the same states. Such disparities in wage rates have permitted disparities in price which have in turn directly shifted, diverted and dislocated the normal flow of bituminous coal in interstate commerce to such an extent as to substantially burden, obstruct and restrain the same and to give to producers employing such competitive methods an undue advantage in interstate commerce over producers of bituminous coal not employing the same.

183. The wages of persons engaged in the production of bituminous coal have a very substantial effect upon interstate commerce in the coal so produced.

184. Such unrestrained and destructive competition in the sale and distribution of bituminous coal in interstate commerce and the cutting of wage rates before described have been the cause of many strikes and suspensions of work which have closed down many mines, some for long periods of time, have caused violent and wide fluctuations in the price of bituminous coal to the consuming public, have caused hardship and put burdens upon many consumers of bituminous coal, have threatened to interrupt and obstruct, and have interrupted and ob-

structed interstate commerce in bituminous coal, and at times have even threatened to stop such interstate commerce for indefinite periods; have substantially dislocated and diverted the normal flow of interstate commerce in such coal, and have obstructed, burdened and restrained interstate commerce in such coal.

185. Said competitive conditions have caused the insolvency of very many coal producers, the abandonment of a great many mining properties before they were completely worked out with a consequent waste of coal resources, repeated and substantial reductions in wage rates, and, unless corrected, threaten to destroy the solvency of a great many of the existing operators and the premature abandonment of many of the existing mines. It is probable that the operation of the law of supply and demand will not serve to eliminate the destructive competitive conditions.

186. The business of selling and distributing bituminous coal in interstate commerce so nearly touches the vital economic interests of the United States that Congress may regulate the prices of the sales of such coal and may forbid unfair competitive practices in said business.

187. The establishment of minimum and maximum prices for bituminous coal sold in interstate commerce in the manner provided in the Act here involved is not arbitrary or unreasonable and is reasonably related to the regulation of interstate commerce in the manner sought to be accomplished by the said Act.

CONCLUSIONS OF LAW

1. This cause involves a substantial adverse controversy arising under the Constitution and laws of the United States.

2. The bill of complaint herein is not premature (Tr. 48).

3. Plaintiff is without any remedy in a court of law to prevent the defendant Company and its officers and directors from assenting to the Code and causing the Company to become a member thereof.

4. Plaintiff has established a standing in equity entitling him to the relief prayed in his bill, if the Code be invalid as an entirety.

5. R. S. §3224 (26 U. S. C. §154) is not a bar to the relief prayed against the Government officer defendants.

6. The suit is not one against the United States.

7. Section 4, Part III, par. (g) of the Bituminous Coal Conservation Act and the corresponding sections of the Code providing that agreements by two-thirds of the employers by tonnage and a majority of the employees as to hours and wages shall be binding upon other Code members is invalid for the following reasons—

(a) No standard is established by said statute.

(b) The power delegated is delegated to private individuals rather than to government officers.

(c) The effect upon interstate commerce in coal of the wages paid to miners is indirect as matter of law.

(d) The regulation of wages and hours of labor of persons engaged in the production of bituminous

coal is not a regulation of interstate commerce and constitutes an invasion of internal concerns of the states.

8. Section 4, Part III, pars. (a) and (b) of the statute and the corresponding sections of the Code do not constitute valid regulations of interstate commerce but are an invasion of the internal concerns of the state reserved to them by the Constitution.

9. The declaratory judgment act is not applicable to this case. The Revenue Act of 1935, approved August 30, 1935, in section 405, excepted from the operation of the Declaratory Judgment Act suits "with respect to federal taxes." The present is such a suit.

10. The provisions of the Act and Code with respect to the fixing of minimum and maximum prices for coal are valid.

(a) The price-fixing provisions of the Act contain no invalid delegation of authority.

(b) The fixing of prices for coal moving and sold in interstate commerce is a valid exercise of the power of Congress to regulate such commerce.

(c) Congress has the power to regulate the prices of coal sold in intrastate commerce since such prices are inextricably intermingled with interstate prices, and since such action is necessary to prevent discrimination against interstate commerce and to make regulation of the prices of coal sold in interstate commerce effective.

(d) The establishment of minimum and maximum prices for bituminous coal is not arbitrary or unrea-

sonable or unrelated to a proper congressional purpose, and does not violate the Fifth Amendment.

11. The regulation of unfair methods of competition in section 4, Part II (i) of the Act lies within the Federal commerce power and does not violate the Fifth Amendment.

12. The labor provisions are separable from the other provisions of the Act and Code.

13. Inasmuch as the provisions of the Act with respect to price-fixing and unfair methods of competition are valid, the taxing provisions of the Act are valid.

14. The plaintiff is not entitled to a permanent injunction to prevent the Carter Coal Company from joining the Code or to prevent the Government officers from collecting the taxes imposed by Section 3 of the Act.

JESSE C. ADKINS,
Justice.

December 10, 1935.

IN THE

SUPREME COURT
of the District of Columbia

HOLDING AN EQUITY COURT

JAMES WALTER CARTER,
Plaintiff,
v.
CARTER COAL COMPANY, *et al.*,
Defendants.

IN EQUITY
No. 59374

FINAL DECREE

This cause came on to be heard at this term, and thereupon, upon consideration thereof, it is by the Court this 10th day of December, 1935,

ADJUDGED, ORDERED and DECREED as follows:

(1) That the bill of complaint heretofore filed herein on the 31st day of August, 1935, by James Walter Carter against Carter Coal Company, George L. Carter, as Vice-President and a Director of said Company, C. A. Hall as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter S. Denham as Vice-Presidents of said Company; Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of

Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, full hearing having been had on the issues raised by said bill of complaint and the answers thereto, be, and the same hereby is, dismissed, and the relief prayed for in said bill of complaint is denied and refused.

(2) The Court finds that this proceeding was brought promptly on August 31, 1935, was brought in good faith and that plaintiff had reasonable ground to contest the validity of the regulatory provisions of the statute involved; and that but for the time required by the Government officer defendants to prepare for trial the case could have been heard and determined before November 1, 1935, the date on which the tax began to accrue; wherefore

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the defendant Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States, his agents, assistants, deputies or employees; defendant M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; defendant Clarence C.

Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; and defendant John B. Colpoys, individually and as United States Marshal in and for the District of Columbia, their agents, assistants, deputies and employees, and each and all of them, be, and they hereby are, permanently enjoined from in any manner, directly or indirectly, assessing or collecting from the defendant Carter Coal Company any taxes or penalties imposed by or accruing under the said Bituminous Coal Conservation Act of 1935 in excess of one and one-half percentum (1-½%) of the sale price at the mines on sales or other disposals of bituminous coal between November 1, 1935, and the date of this decree by the defendant Carter Coal Company; from causing any Collector or Deputy Collector of Internal Revenue of the United States, or any other Government officer or subordinate or assistant to assess or collect any such taxes or penalties for said period in excess of said amount from defendant Carter Coal Company; from seizing any of the property; from distraining, seizing, entering upon or attaching, or commencing any forfeiture proceedings against the property of said Company; and from enforcing any of the remedies provided for the collection of internal revenue of the United States against said Company, its property, officers or agents for the non-payment of such taxes or penalties in excess of said amount for such period.

AND IT IS FURTHER ORDERED that the defendants Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Solicitor General and Act-

ing Attorney General of the United States; and Leslie C. Garnett, individually and as the United States Attorney in and for the District of Columbia, their agents, assistants, deputies and employees, be, and they hereby are, jointly and severally, permanently enjoined from, directly or indirectly, attempting to collect by suits or prosecutions, or otherwise, any such taxes or penalties from defendant Carter Coal Company or any of its officers or directors in excess of one and one-half per centum (1-½%) of the sale price at the mines on sales or other disposals of bituminous coal between November 1, 1935, and the date of this decree by the defendant Carter Coal Company.

(3) The plaintiff having announced in open court that he desires and intends to appeal from this decree to the United States Court of Appeals for the District of Columbia and having moved that a stay and injunction be granted restraining the Carter Coal Company and the company officer defendants from executing or filing an acceptance of the Bituminous Coal Code and from paying the tax imposed by the Bituminous Coal Conservation Act of 1935, and enjoining the government officer defendants from taking any action to collect the tax imposed by said Act,

IT IS ORDERED that, pending final determination of this cause on appeal, the company and the company officer defendants are enjoined from executing or filing any acceptance of the Bituminous Coal Code or paying the tax imposed by the Bituminous Coal Conservation Act of 1935, and the government officer defendants are enjoined from collecting or attempting to collect the said tax from the Carter Coal Company; but this stay is granted upon the ex-

press condition that on or before the 2nd day of January, 1936, and on or before the 1st day of each succeeding month thereafter, during the pendency of this cause on appeal, there shall be paid to a depository to be approved by this Court a sum equal to one and one-half per centum (1-½%) of the sale price at the mine on sales or other disposals of bituminous coal by the defendant Carter Coal Company during the period beginning with November 1, 1935, for which a tax payment under said Act shall be due, said sum to be held by the depository pending the final outcome of this litigation and subject to the further orders of this Court.

JESSE C. ADKINS,
Justice.

Exception of the plaintiff James Walter Carter is hereby noted to the entry of so much of the above decree as dismisses the bill of complaint and as refuses the relief prayed herein by the plaintiff, or any of such relief; and the plaintiff, by his attorneys, in open court petitions for and notes an appeal from the above decree to the United States Court of Appeals for the District of Columbia on this 10th day of December, 1935, which appeal is hereby granted and noted, whereupon the maximum undertaking for costs is hereby fixed at one hundred dollars ($100.00) with leave to deposit the sum of fifty dollars ($50.00) with the Clerk in lieu thereof.

JESSE C. ADKINS,
Justice.

Exception of the defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, to the entry of so much of the above decree as grants an injunction against the said defendants, or any of them, being the portion of the above decree numbered (2) is hereby noted; and such defendants, by their attorneys, petition for and note an appeal from the above decree to the United States Court of Appeals for the District of Columbia on this 10th day of December, 1935, which appeal is hereby granted and noted.

JESSE C. ADKINS,
Justice.

[fol. 226] IN SUPREME COURT OF DISTRICT OF COLUMBIA

PLAINTIFF'S EXCEPTIONS TO FINDINGS AND CONCLUSIONS—
Filed December 16, 1935

* * * * * * *

Plaintiff excepts as follows with respect to the findings and conclusions of the Court:

A. With respect to evidentiary facts:

1. To that portion of Finding 43 to the effect that the use of bituminous coal in generating energy for the production of light, heat and power is vital to the public welfare, and that, in view of the present importance of bituminous coal as a source of energy, it is of great importance to the public welfare that the distribution and marketing of bituminous coal both in interstate and intrastate commerce be not subjected to interruptions, dislocations, burdens or restraints; as not supported by the evidence, and as indefinite and uncertain.

2. To that portion of Finding 54 to the effect that industrial consumers without convertible equipment, because of the cost of conversion, will not ordinarily shift from coal [fol. 227] to oil unless they are of opinion that the cost of coal will be considerably higher than that of oil over a considerable period of time, as not supported by competent evidence, as indefinite, uncertain and conjectural, and as inconsistent with other facts found.

3. To that portion of Finding 64 to the effect that as a result of wages in the coal industries being over 59% of the total value of the product in 1929, whereas the general average for the four other large mining industries was 21% and for the forty-eight large manufacturing industries was 18.2%, the pressure of competition acts with particular force to cause wage reductions in the bituminous coal industry, as not supported by the evidence.

4. To that portion of Finding 108 to the effect that operators necessarily cut their wage rates when they cut their prices, and to that portion of the same finding to the effect that the closing down because of the 1927 strike of many

mines in Illinois, Indiana, Ohio, parts of Pennsylvania and the organized states of the West substantially affected the distribution of coal in interstate commerce, on the ground that the finding is not supported by the evidence.

5. To that portion of Finding 110 to the effect that suspensions after that of 1922 laid upon consumers the burden of accumulating large stocks in anticipation of shortage, as not supported by the evidence.

6. To that portion of Finding 115 to the effect that price reductions forced wage rate cuts in a descending spiral, as vague and indefinite and as not supported by the evidence.

7. To that portion of Finding 129 to the effect that between [fol. 228] the years 1927 and 1933 practically the entire bituminous coal industry was engaged in a demoralizing competitive warfare in which wage rate cutting followed price cutting in a continually descending spiral, as vague and indefinite and as not supported by the evidence.

8. To that portion of Finding 140 to the effect that the closing of mines by reason of strikes and suspensions has usually involved a diversion or dislocation of commerce, as vague and indefinite and as not supported by the evidence.

9. To that portion of Finding 158 to the effect that the great bulk of the total reserves consists of coal so low in grade, so deeply buried, so inaccessible, or in such thin beds that it has no present value and could be produced only at a great increase over present cost, as not supported by competent evidence, as conjectural, and as inconsistent with other facts found.

10. To Finding 166 as irrelevant and immaterial.

11. To each and every of the findings above excepted to, upon the further ground that they are not supported by the evidence, and are inconsistent with other facts found.

12. To the refusal of the Court to find, in connection with Finding 131, that strikes caused by attempts on the part of employees to bargain collectively concerning wages, hours and conditions of employment and the refusal of the employers so to bargain, have been due in large part to the desire and purpose of the miners' union to increase its position and power among the mine workers, and its membership.

13. To the refusal of the Court to find, in connection with [fol. 229] Finding 109, that the strikes in 1928 and 1932 were local and sporadic.

14. To the refusal of the Court to find that since 1922, viewing the nation as a whole, there has been no substantial stoppage in commerce in bituminous coal as a result of industrial disputes (Tr. 555-556, 755, 918-920, 1405-1407).

15. To the refusal of the Court to find that none of the strikes which have occurred since 1922 have had any material effect on the total national supply of coal (Tr. 556).

16. To the refusal of the Court to find that any long continued application of price control in the bituminous coal industry would have to be accompanied by control of capacity of production in order to be permanently successful (Tr. 537-538, 691-693); and that price control alone would operate successfully only temporarily,—for about one year in the estimation of one witness (Tr. 692-693).

17. To the refusal of the Court to find that it is a fact of common knowledge that each of the commodities described in Finding No. 165 is used or consumed in every state of the United States, and that the use of such commodities or any of them, is indispensable to the industrial and economic life and to the health and comfort of the inhabitants of every state and of the District of Columbia.

18. To the refusal of the Court to find that the lowering of wage rates in connection with competition in the bituminous coal industry from 1923 through 1929 did not result, generally, in any lowering of the annual earnings of the men [fol. 230] employed in the industry (Pl. Ex. 82B and 88).

19. To the refusal of the Court to find in connection with Finding 118 that, in addition to wage differentials and freight rates, quality of the respective coals (Tr. 821) and natural conditions (Tr. 1545-1546) were factors in connection with the shift of shipments of coal from the fields north of the Ohio and Potomac Rivers to the fields immediately south thereof between 1923 and 1933.

B. With respect to ultimate facts:

20. To Finding 172, in respect of the use of bituminous coal being vital to the public welfare, and in respect of the

importance of regularity, continuity and freedom from interruptions, obstructions, burdens and restraints of distribution of bituminous coal, as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

21. To Finding 173, in respect of the dependency of the existing railroads of the country upon the production and distribution of bituminous coal, as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

22. To Finding 174 and severally to each sentence thereof, as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence, and to the second sentence thereof upon the additional ground that it is erroneous in fact and law, and is a conclusion of law.

23. To Finding 175, as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

[fol. 231] 24. To Finding 176, upon the ground that it is not the mine price but the delivered price in the market which is controlling in competition in bituminous coal sales, and as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence, and as taking no account of evidence and facts found in respect of markets and freight rates.

25. To Finding 177 as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence, and upon the further ground that it is a conclusion of law and is erroneous in fact and law.

26. To Finding 178 as vague and indefinite in its use of "unrestrained and destructive," and as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

27. To Finding 179 upon the ground of indefiniteness in respect of the terms "destructive," "price-cutting," "possibly" and "average cost of production," and as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

28. To Finding 180 as indefinite in respect of the terms "destructive" and "the normal flow," as in part a conclusion of law, as erroneous in fact and law, and as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

29. To Finding 181, upon the ground that it is irrelevant and immaterial; upon the ground of the indefiniteness of the use of the terms "unrestrained and destructive competition," "unfair competitive practices," and "demoralize"; [fol. 232] as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence, and upon the further ground that it is in part a conclusion of law and is erroneous in fact and law.

30. To Finding 182, and each and every sentence thereof, as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

31. To Finding 183, as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

32. To Finding 184 as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, as not supported by the evidence, as indefinite, as in part a conclusion of law and as erroneous in fact and law.

33. To Finding 185 as wholly conjectural and as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

34. To Findings 178 through 185, inclusive, on the ground that the uncontradicted evidence establishes that it is overcapacity that is fundamentally responsible for the difficulties of the bituminous coal industry.

35. To Findings 178 through 185, inclusive, by reason of the failure and refusal to find in each and all of said findings, or to the failure and refusal to find independently thereof and as a separate finding, that the competition among producers of bituminous coal does not constitute or directly cause, and has not constituted or directly caused, a burden upon, obstruction to, or restraint of interstate commerce in bituminous coal, or interstate commerce generally.

36. To Finding 186 upon the ground that it is not a finding of ultimate fact but a conclusion of law, and is not in accord with law; as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence; and, to the extent that it constitutes [fol. 233] or includes conclusions of fact, to such conclusions as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

37. To Finding 187 upon the ground that it is not a finding of ultimate fact but a conclusion of law, and is not in accord with law; and, to the extent that it constitutes or includes conclusions of fact, to such conclusions as not supported by the evidentiary findings, as inconsistent with evidentiary facts found, and as not supported by the evidence.

38. To the refusal of the Court to find as an ultimate fact that should the Carter Coal Company become a member of the Code and comply with its provisions, serious, substantial and irreparable injury to the liberty and to the property rights of the Company and of the plaintiff would impend in the following, among other, respects (to the refusal to find each of which separate exception is taken): (1) loss of liberty of the Company to make contracts with its employees upon mutually satisfactory terms as to wages and hours, and to make contracts with its customers as to mutually satisfactory prices for its products; (2) disclosure of the confidential records of the Company respecting all its contracts, invoices, credit memoranda and other information concerning the preparation, cost, sale and distribution of coal, to a district board composed of its competitors or representatives of its competitors; (3) subjection of the Company and of the plaintiff to a multiplicity of suits, either criminal or civil, either by private persons or by Governments, for alleged violation of the anti-trust laws of the United States or of the States; (4) subjection to suits for damages under contracts breached by the Company in compliance with the Code; (5) injury through surrender of the management of the Company to a Government commission [fol. 234] and to the competitors of the Company, and the possibility of minority stockholders' or quo warranto proceedings challenging such surrender as ultra vires the Com-

pany; (6) loss of business to competing fuels and through greater efficiency in the use of coal, should coal prices advance under the Code; and that such loss, if consummated, will lessen and diminish the equity of shareholders of the Carter Company, and that the interest of plaintiff as shareholder in said Company will be greatly and irreparably injured thereby.

39. To the refusal of the Court to find specifically and in terms as an ultimate fact that the tax imposed by the Act upon the sale or other disposal of bituminous coal by producers not assenting to and complying with the Code is, in point of fact, coercive and compulsive, and is a penalty to compel acceptance of and compliance with said Code.

40. To the refusal of the Court to find specifically and in terms as an ultimate fact that the said penalty will compel the defendant Carter Coal Company to accept and to comply with the said Code.

41. To the refusal of the Court to find specifically and in terms as an ultimate fact that the plaintiff and the defendant Carter Coal Company and each of them severally would suffer substantial, immediate and irreparable injury through the collection from the Company of the tax imposed by the Act upon producers failing to accept and comply with the Code.

42. To the refusal of the Court to find specifically and in terms as an ultimate fact that the wages, hours and work-
[fol. 235] ing conditions of persons engaged in the local activity of the production of bituminous coal, and the method of determining the same, have no direct effect upon interstate commerce.

43. To the refusal of the Court to find specifically and in terms as an ultimate fact that the wages, hours and working conditions of persons employed by defendant Carter Coal Company engaged in the local activity of the production of bituminous coal, and the method of determining the same, have no direct effect upon interstate commerce.

44. To the refusal of the Court to find as an ultimate fact that the price at which bituminous coal is sold at the mouth of the mine does not directly affect interstate commerce and does not directly obstruct, restrain or impose any direct burden upon interstate commerce.

45. To the refusal of the Court to find as an ultimate fact that the prices at which Carter Coal Company sells the coals produced by it have no direct effect upon interstate commerce.

46. To the refusal of the Court to find as an ultimate fact that the prices at which Carter Coal Company sells the coals produced by it to consumers within the State of production do not directly obstruct, restrain or impose any direct burden upon interstate commerce.

47. To the refusal of the Court to find as an ultimate fact that the prices at which Carter Coal Company sells the coals produced by it by sales consummated at the mouth of the mine for transportation to other States do not directly obstruct, restrain or impose any direct burden upon interstate commerce.

[fol. 236] C. With respect to conclusions:

48. To the inclusion of the clause "if the Code be invalid as an entirety" in Conclusion 4, and to the refusal of the Court to conclude that plaintiff is entitled to the relief prayed in this cause if any provision of the Act or the Code challenged herein be invalid.

49. To the refusal of the Court to conclude that Section 4, Part III, pars. (a), (b) and (g), and the corresponding sections of the Code, are invalid for, in addition to the grounds set forth in Conclusions 7 and 8, the further reason of the Tenth Amendment and of the due process and just compensation clauses of the Fifth Amendment to the Con- that they and each of them are repugnant to and violative stitution of the United States.

50. To the refusal of the Court to conclude that Section 4, Part III, pars. (c), (d), (e) and (f), and the corresponding sections of the Code, are each of them invalid because not within the power of the Congress under the commerce clause of the Constitution of the United States and because repugnant to the due process and just compensation clauses of the Fifth Amendment and to the Tenth Amendment to the Constitution of the United States.

51. To Conclusion 9 upon the ground that said conclusion is erroneous in fact and in law.

52. To the refusal of the Court to conclude that the declaratory judgment statute is applicable to the controversy between the plaintiff and the defendant Carter Coal Company and its officers and directors; to its refusal to conclude that a declaratory judgment should be granted adjudging and decreeing that Section 4 of the Act and the Code do not [fol. 237] constitute a valid regulation of commerce among the States; to its refusal to conclude that the declaratory judgment statute is applicable in respect of the taxing provisions; to the failure to conclude that a declaratory judgment should be granted adjudging and decreeing that the tax imposed upon producers not assenting to and complying with the Code is likewise invalid and unconstitutional; and to the failure to make each or any of these conclusions.

53. To Conclusion 10, and to each and every subdivision thereof, upon the ground that they and each of them are erroneous in fact and in law; and to the refusal of the Court to conclude that the provisions of the Act and the Code with respect to the fixing of minimum and maximum prices are invalid upon each and all of the following several grounds (to the refusal to conclude each of which a separate exception is taken):

(a) because constituting an unauthorized delegation of authority in violation of Article I, Section 1 and of Article II, Section 2, Paragraph 2 of the Constitution of the United States, and of the due process clause of the Fifth Amendment thereto;

(b) because not within the powers conferred upon the Congress by the commerce clause of the Constitution of the United States;

(c) because attempting to regulate the prices of all coal produced and sold, whether to be transported in interstate commerce or not;

(d) because violative of the due process and just compensation clauses of the Fifth Amendment;

(e) because violative of the Tenth Amendment; and

[fol. 238] (f) because inseparable from the invalid labor provisions of the Act and of the Code.

54. To Conclusion 11 upon the ground that it is erroneous in fact and law.

55. To Conclusion 12 upon the ground that it is erroneous in fact and in law; and to the refusal of the Court to conclude that the labor provisions are inseparable from the other provisions of the Act and the Code, and each of them, and particularly from the price-fixing provisions thereof.

56. To the refusal of the Court to conclude that Section 3 of the Act is not severable in its application to Section 4 or to the Code, or to the several parts of each.

57. To Conclusion 13, upon the ground that it is erroneous in fact and in law; and to the refusal of the Court to conclude that the taxing provisions of the Act are invalid.

58. To the refusal of the Court to conclude that, inasmuch as the so-called "tax" sought to be imposed by the Act is a penalty and not a tax the taxing provisions of the Act are invalid if any part of the regulatory provisions of Section 4 or the Code challenged herein are invalid.

59. To the refusal of the Court to conclude, specifically and in terms, that the so-called "tax" imposed by Section 3 of the Act upon producers of bituminous coal failing to accept and comply with the Code, is in reality a penalty and cannot be sustained as an exercise of the taxing power of the Federal Government.

60. To Conclusion 14 upon the ground that it is erroneous in law; and to the refusal of the Court to conclude to the contrary.

[fol. 239] 61. To the refusal of the Court to conclude that a permanent injunction should be granted preventing the defendant Carter Coal Company from accepting or complying with the Code and preventing the Government officer defendants from assessing or collecting any tax accruing during the period of the pendency in good faith of proceedings to review the decree herein in appellate courts.

62. To each and every conclusion of law hereinabove excepted to, upon the further ground that to the extent that they involve or are based upon conclusions of fact they are unsupported by the ultimate or evidentiary facts, are

inconsistent with facts found, and are unsupported by or inconsistent with the evidence.

Frederick H. Wood, William D. Whitney, Richard H. Wilmer, Reynolds Robertson, Attorneys for Plaintiff-Appellant.

The foregoing exceptions noted and allowed of record this 16th day of December, 1935.

Jesse C. Adkins, Justice.

Receipt of copy acknowledged this 16th day of December 1935.

Karl J. Hardy, Joseph Fitzgerald, Jr., Attys. for Carter Coal Co., et al. John Dickinson, Assistant Attorney General. WB.

[fol. 240] In Supreme Court of District of Columbia

Exceptions of Defendant Government Officers to Findings and Conclusions—Filed December 16, 1935.

Defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, and each of them except to the following Findings and Conclusions of the Court:

1. To the Court's Finding of Fact No. 169 to the effect that the act of joining the Code by the Carter Coal Company would compel it to cancel existing contracts and to pay its proportionate share of administering the Code, upon the ground that said Finding is a conclusion of law and erroneous in point of law.

[fol. 241] 2. To the Court's Conclusion of Law No. 2 to the effect that the bill of complaint herein is not premature upon the ground that said conclusion is erroneous in point of fact and law.

3. To the refusal of the Court to conclude as a matter of law that plaintiff's bill of complaint as amended is premature on the ground stated in Par. 8, Part III, of the answer of these defendants.

4. To the Court's Conclusion of Law No. 4 to the effect that plaintiff has established a standing in equity entitling him to the relief prayed in his bill if the Code be invalid as an entirety upon the ground that said conclusion is erroneous in point of fact and law.

5. To the refusal of the Court to conclude as a matter of law upon the ground stated in Par. 2, Part III, of the answer of said defendants that the Act and Code afford to Code members, and to the Carter Coal Company should it join the Code, full, complete and adequate administrative remedies for all of the injuries of which plaintiff complains.

6. To the Court's Conclusion of Law No. 5 to the effect that Revised Statutes, Sec. 3224 (26 U. S. C., Sec. 154) is not a bar to the relief prayed against the Government officer defendants upon the ground that said conclusion is erroneous in point of fact and law.

7. To the Court's Conclusion of Law No. 7 and to subdivisions (a) and (b) thereof, upon the ground that said conclusion and each of such subdivisions are erroneous in point of law, and to subdivisions (c) and (d) thereof, upon the ground that said subdivisions are erroneous in point of [fol. 242] fact and law.

8. To the Court's Conclusion of Law No. 8 to the effect that Section 4, Part III, Par. (a) and (b) of the statute and the corresponding sections of the Code do not constitute valid regulations of interstate commerce but are an invasion of internal concerns of the state reserved to them by the Constitution upon the ground that said conclusion is erroneous in fact and in law.

John Dickinson, Assistant Attorney General. W. B. F. B. Critchlow, Special Assistant to the Attorney General.

The foregoing exceptions noted and allowed of record this 16th day of December, 1935.

Jesse C. Adkins, Justice.

Service acknowledged this 16th day of December, 1935. Reynolds Robertson, Attorneys for James Walter Carter. Karl J. Hardy, Joseph FitzGerald, Jr., Attorneys for Carter Coal Company, et al.

[fol. 243] In Supreme Court of District of Columbia

[Title omitted]

Assignment of Errors of the Defendant Government Officers—Filed December 16, 1935

Come now defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, in the above entitled cause and file the following assignment of errors upon which they will rely in the prosecution of their appeal in said cause from the decree of this Court entered on the 10th day of December, 1935:

1. The decree is erroneous in so far as it is therein ordered, adjudged and decreed that defendants Guy T. [fol. 244] Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Act-

ing Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, or any of them, be permanently enjoined from assessing, collecting or attempting to assess or collect from the defendant Carter Coal Company any taxes imposed or accruing under the provisions of the Bituminous Coal Conservation Act of 1935 in excess of one and one-half percent. (1½%) of the sale price at the mines on sales or other disposals of bituminous coal by the said Carter Coal Company between November 1, 1935 and the date of the decree.

2. The Court erred in making and entering all of that part of said decree contained in the portion thereof numbered (2).

3. The Court erred in permanently enjoining defendant Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; defendant M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; defendant Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector [fol. 245] of Internal Revenue for Division No. 2 of the Collection District of Maryland; and defendant John B. Colpoys, individually and as United States Marshal in and for the District of Columbia, their agents, assistants, deputies and employees, from assessing or collecting from the defendant Carter Coal Company any taxes or penalties imposed by or accruing under said Bituminous Coal Conservation Act of 1935 in excess of one and one-half percent. (1½%) of the sale price at the mines on sales or other disposals of bituminous coal by the defendant Carter Coal Company between November 1, 1935 and the date of the decree herein, and from attempting in any way to collect or to enforce collection from the Carter Coal Company of any of such taxes or penalties.

This assignment is made jointly and severally by and on behalf of the defendants in this assignment named.

4. The Court erred in permanently enjoining defendants Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Solicitor General and Acting Attorney General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, their agents, assistants, deputies and employees, jointly and severally, from attempting to collect by suits or prosecutions or otherwise any such taxes or penalties from defendant Carter Coal Company or any of its officers or directors in excess of one and one-half percent. (1½%) of the sale price at the mines on sales or other disposals of bituminous coal by the defendant Carter Coal Company between November 1, 1935, and the date of the decree herein.

This assignment is made jointly and severally by and on behalf of the defendants in this assignment named.

[fol. 245a] Wherefore, said defendants pray that the said decree in respect to the parts or portions thereof herein above specified or referred to be reversed and for such other and further relief as to the Court may seem just and proper.

John Dickinson, W. B., Assistant Attorney General.

Service acknowledged this 16th day of December, 1935.
Reynolds Robertson, Douglas L. Hatch, Attorneys for James Walter Carter. Karl J. Hardy, Joseph Fitzgerald, Jr., Attorneys for Carter Coal Company, et al.

[fol. 246] In Supreme Court of District of Columbia

Stipulation Waiving Citation, Etc.—Filed December 16, 1935

It is hereby stipulated and agreed by and between counsel for all parties of record in the above entitled cause that:

1. The plaintiff James Walter Carter, hereby waives the service of citation upon him in the appeal taken by the defendants Guy T. Helvering, et al. on December 10, 1935, and

consents that he shall be regarded as having been cited as an appellee in that appeal.

2. That the defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the Dis-[fol. 247] trict of Columbia, hereby waive service of citation upon them in the appeal taken herein on December 10, 1935 by plaintiff James Walter Carter, and agree that they shall be regarded as having been cited as parties appellee to said appeal.

3. The defendants Carter Coal Company, George L. Carter as Vice President and Director of said Company; C. A. Hall as Secretary-Treasurer and a Director of said Company, John Callahan, Joseph W. Gorman and Walter C. Denham as Vice-Presidents of said Company, waive service of citation upon them in the appeal of James Walter Carter and in the appeal of the defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States, Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia; and agree that they shall be regarded

as having been cited as parties appellee to both such appeals.

Reynolds Robertson, Douglas L. Hatch, Counsel for James Walter Carter. John Dickinson, Counsel for Defendant Government Officers. W. B. Karl J. Hardy, Joseph FitzGerald, Jr., Counsel for Carter Coal Company.

December 16, 1935.

[fol. 248] IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDUM

December 16, 1935.—$50 deposited in lieu of undertaking on appeal.

[fol. 249] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed December 16, 1935

Now comes the plaintiff, James Walter Carter, by his attorneys and says that in the record and proceedings herein and in the decree entered herein on December 10, 1935, there is error in the following respects:

The Court erred:

1. In overruling and denying plaintiff's applications for permanent injunctions as prayed in the bill of complaint, as amended.

2. In failing and refusing to find, hold, adjudge and decree the relief prayed for by the plaintiff in his bill of complaint, as amended, as to each and every of the defendants severally.

3. In failing and refusing to find, hold, adjudge and decree the relief prayed for by the plaintiff in his bill of complaint, as amended, or any of such relief.

4. In failing and refusing to find, hold, adjudge and decree any part of the relief prayed for by the plaintiff in his [fol. 250] bill of complaint, as amended, as to each and every of the defendants severally.

5. In dismissing plaintiff's bill of complaint, as amended.

6. In overruling and denying plaintiff's application for a declaratory judgment in the controversy between the plaintiff and the defendant Carter Coal Company and its officers and directors.

7. In overruling and denying plaintiff's application for a declaratory judgment in the controversy between the plaintiff and the Government officer defendants.

8. In overruling and denying plaintiff's application for a permanent injunction restraining the Carter Coal Company and its officers and directors from accepting or complying with the Bituminous Code during the pendency of appellate proceedings taken in good faith to review the decree herein; and restraining the Government officer defendants from assessing or collecting or attempting to assess or collect from defendant Carter Coal Company the taxes accruing under Section 3 of the Act by reason of its failure to accept and comply with said Code during the pendency of such appellate proceedings.

9. In requiring as an express condition to the granting of the stay contained in paragraph numbered (3) of its decree, that on or before the second day of January, 1936, and on or before the first day of each succeeding month thereafter, during the pendency of this cause on appeal, there shall be paid to a depository to be approved by the Court a sum equal to 1½% of the sale price at the mine on sales or other disposals of bituminous coal by the defendant Carter Coal Company during the period beginning No- [fol. 251] vember 1, 1935, such deposits to be held by the depository pending the final outcome of this litigation and subject to the further orders of the Court.

10. In finding, holding, adjudging and decreeing that Section 4 of the Bituminous Coal Conservation Act of 1935 and the Code formulated and promulgated thereunder are constitutional and valid in part and, therefore, enforcible as against Carter Coal Company and its officers and directors by means of the so-called "tax" provided in Section 3 of the said Act.

11. In holding and concluding that the plaintiff is entitled to the relief prayed in his bill only if the Code be

invalid as an entirety, and in failing to hold and conclude that plaintiff is entitled to the relief prayed in this cause if any provision of the Act or of the Code challenged in this proceeding be invalid.

12. In refusing to hold and conclude that Section 4, Part III, pars. (a), (b) and (g), and the corresponding sections of the Code, are invalid for, in addition to the grounds set forth in conclusions of law numbered 7 and 8, the further reason that they and each of them are repugnant to and violative of the Tenth Amendment, and of the due process and just compensation clauses of the Fifth Amendment to the Constitution of the United States.

13. In refusing to hold and conclude that Section 4, Part III, pars. (c), (d), (e) and (f), and the corresponding sections of the Code, are each of them invalid because not within the power of the Congress under the commerce clause of the Constitution of the United States, and because repugnant to the due process and just compensation clauses [fol. 252] of the Fifth Amendment and to the Tenth Amendment to the Constitution of the United States.

14. In holding and concluding that the declaratory judgment act is not applicable to this case.

15. In refusing to hold and conclude that the declaratory judgment statute is applicable to the controversy between the plaintiff and the defendant Carter Coal Company and its officers and directors.

16. In refusing to hold and conclude that a declaratory judgment should be granted adjudging and decreeing that Section 4 of the Act and the Code do not constitute a valid regulation of commerce among the states.

17. In refusing to hold and conclude that the declaratory judgment statute is applicable in respect of the taxing provisions of the Bituminous Coal Conservation Act of 1935.

18. In refusing to hold and conclude that a declaratory judgment should be granted adjudging and decreeing that the tax imposed upon producers not assenting to or complying with the Code is invalid and unconstitutional.

19. In holding and concluding that the provisions of the Act and of the Code with respect to the fixing of minimum

and maximum prices for coal are valid and in failing to hold and conclude the contrary.

20. In holding and concluding that the provisions of the Act and of the Code with respect to the fixing of minimum and maximum prices for coal contain no invalid delegation of authority, and in failing to hold and conclude that such provisions constitute an unauthorized delegation of authority in violation of Article I, Section 1, and of Article II, [fol. 253] Section 2, par. 2, of the Constitution of the United States, and of the due process and just compensation clauses of the Fifth Amendment thereto.

21. In holding and concluding that the provisions of the Act and of the Code with respect to the fixing of minimum and maximum prices for coal constitute a valid exercise of the power of the Congress to regulate interstate commerce, and in failing to hold that such provisions are not within the powers conferred upon the Congress by the commerce clause of the Constitution of the United States.

22. In holding and concluding that the provisions of the Act and of the Code with respect to the fixing of minimum and maximum prices for coal sold in intrastate commerce are valid, and in failing to hold that such attempt to regulate the prices of all coal sold and produced, whether to be transported in interstate commerce or not, is not within the power of the Congress under the commerce clause of the Constitution of the United States.

23. In holding and concluding that the provisions of the Act and of the Code with respect to the fixing of minimum and maximum prices for coal are not arbitrary or unreasonable or unrelated to a proper congressional purpose and do not violate the Fifth Amendment to the Constitution of the United States; and in refusing to hold and conclude that such provisions violate the due process and just compensation clauses of the Fifth Amendment to the Constitution of the United States.

24. In refusing to hold and conclude that the provisions of the Act and of the Code with respect to the fixing of minimum and maximum prices for coal are violative of the [fol. 254] Tenth Amendment to the Constitution of the United States.

25. In refusing to hold and conclude that the provisions of the Act with respect to the fixing of minimum and maximum prices for coal are invalid because inseparable from the invalid labor provisions of the Act.

26. In refusing to hold and conclude that the provisions of the Code with respect to the fixing of minimum and maximum prices for coal are invalid because inseparable from the invalid labor provisions of the Code.

27. In holding and concluding that the regulation of unfair methods of competition in Section 4, Part II(1) of the Act, lies within the Federal commerce power and does not violate the Fifth Amendment to the Constitution of the United States and in refusing to hold and conclude to the contrary.

28. In holding and concluding that the labor provisions of the Act are separable from the other provisions of the Act and in refusing to hold and conclude that the labor provisions of the Act are inseparable from the other provisions of the Act, and each of them, and particularly from the price-fixing provisions thereof.

29. In holding and concluding that the labor provisions of the Code are separable from the other provisions of the Code and in refusing to hold and conclude that the labor provisions of the Code are inseparable from the other provisions of the Code, and each of them, and particularly from the price-fixing provisions thereof.

30. In refusing to hold and conclude that Section 3 of the Act is not severable in its application to Section 4 or to [fol. 255] the Code, or to the several parts of each.

31. In holding and concluding that inasmuch as the provisions of the Act with respect to price-fixing and unfair methods of competition are valid, the taxing provisions of the Act are valid; and in refusing to hold and conclude that the taxing provisions of the Act are invalid.

32. In refusing to hold and conclude that inasmuch as the so-called "tax" sought to be imposed by the Act is a penalty and not a tax, the taxing provisions of the Act are invalid if any part of the regulatory provisions of Section 4 or of the Code challenged herein are invalid.

33. In refusing to hold and conclude, specifically and in terms, that the so-called "tax" imposed by Section 3 of the

Act upon producers of bituminous coal failing to accept and comply with the Code, is in reality a penalty and cannot be sustained as an exercise of the taxing power of the Federal Government.

34. In holding and concluding that the plaintiff is not entitled to a permanent injunction to prevent the Carter Coal Company from accepting or complying with the Code, or to prevent the Government officers from collecting the taxes imposed by Section 3 of the Act; and in refusing to hold and conclude to the contrary.

35. In making findings of ultimate facts which are not supported by the evidentiary finding, are inconsistent with facts found or concluded, and are not supported by the evidence, as follows:

(a) Finding 172 in respect of the use of bituminous coal being vital to the public welfare, and in respect of the importance of regularity, continuity and freedom from interruptions, obstacles, burdens and restraints of distribution [fol. 256] of bituminous coal;

(b) Finding 173 in respect of the dependency of the existing railroads of the country upon the production and distribution of bituminous coal;

(c) Finding 174, and each and every sentence thereof; (and in finding as a fact the matter contained in the second sentence thereof, upon the additional ground that it is erroneous in fact that in law and is a conclusion of law);

(d) Finding 175;

(e) Finding 176;

(f) Finding 177 (and in respect of this finding upon the additional ground that it is erroneous in fact and in law and is a conclusion of law);

(g) Finding 178 (and upon the additional ground that it is vague and indefinite in its use of "unrestrained and destructive");

(h) Finding 179 (and upon the additional ground of indefiniteness in respect of the terms "destructive", "price-cutting", "possibly" and "average cost of production");

(i) Finding 180 (and upon the additional grounds of indefiniteness in respect of the terms "destructive" and "the normal flow", and that it is in part a conclusion of law and is erroneous in fact and law);

(j) Finding 181 (and upon the additional grounds that it is irrelevant and immaterial, and of indefiniteness in the use of the terms "unrestrained and destructive competition", "unfair competitive practices" and "demoralize"; and that it is in part a conclusion of law and is erroneous in fact and law);

(k) Finding 182, and each and every sentence thereof;

(l) Finding 183;

(m) Finding 184 (and upon the additional ground that it is in part a conclusion of law and is erroneous in fact and law);

(n) Finding 185 (and upon the additional ground that it is wholly conjectural);

(o) Findings 178 through 185, inclusive, (and upon the additional ground that the uncontradicted evidence establishes that it is overcapacity that is fundamentally responsible for the difficulties of the bituminous coal industry);

(p) Findings 178 through 185, inclusive, (and upon the additional ground of the failure and refusal to find in each and all of said findings, or the failure and refusal to find independently thereof and as a separate finding, that the competition among producers of bituminous coal does not constitute or directly cause, and has not constituted or [fol. 257] directly caused, a burden upon, obstruction to, or restraint of, interstate commerce in bituminous coal, or interstate commerce generally);

(q) Finding 186 (and upon the additional ground that it is not a finding of ultimate fact but a conclusion of law and is not in accord with law);

(r) Finding 187 (and upon the additional ground that it is not a finding of ultimate fact but conclusion of law and is not in accord with law).

36. In refusing to make findings of ultimate facts as follows:

(a) That, should the Carter Coal Company become a member of the Code and comply with its provisions, serious, substantial and irreparable injury to the liberty and to the property rights of the Company and the plaintiff would impend in the following, among other, respects: (1) loss of liberty of the Company to make contracts with its employees upon mutually satisfactory terms as to wages and hours, and to make contracts with its customers as to mutually satisfactory prices for its products; (2) disclosure of the confidential records of the Company respecting all its contracts, invoices, credit memoranda and other information concerning the preparation, cost, sale and distribution of coal, to a district board composed of its competitors or representatives of its competitors; (3) subjection of the Company and of the plaintiff to a multiplicity of suits, either criminal or civil, either by private persons or by Governments, for alleged violation of the anti-trust laws of the United States or of the States; (4) subjection to suits for damages under contracts breached by the Company in compliance with the Code; (5) injury through surrender of the management of the Company to a Government commission and to the competitors of the Company, and the possibility of minority stockholders' or quo warranto proceedings challenging such surrender as ultra vires the Company; (6) loss of business to competing fuels and through greater efficiency in the use of coal, should coal prices advance under the Code; and that such loss, if consummated, will lessen and diminish the equity of shareholders of the Carter Company and that the interest of plaintiff as shareholder in said Company would be greatly and irreparably injured;

(b) That, specifically and in terms, the tax imposed by the Act upon the sale of or the disposal of bituminous coal by producers not assenting to or complying with the Code is, in point of fact, coercive and compulsive, and is a penalty to compel acceptance of and compliance with said Code;

(c) That, specifically and in terms, the said penalty will [fol. 258] compel the defendant Carter Coal Company to accept and comply with the said Code;

(d) That, specifically and in terms, the plaintiff and the defendant Carter Coal Company, and each of them severally, will suffer substantial, immediate and irreparable injury through the collection from the Company of the tax imposed

by the Act upon producers failing to accept and comply with the Code;

(e) That, specifically and in terms, the wages, hours and working conditions of persons engaged in the local activity of the production of bituminous coal, and the method of determining the same, have no direct effect upon interstate commerce;

(f) That, specifically and in terms, the wages, hours and working conditions of persons employed by defendant Carter Coal Company engaged in the local activity of the production of bituminous coal, and the method of determining the same, have no direct effect upon interstate commerce;

(g) That the price at which bituminous coal is sold at the mouth of the mine does not directly affect interstate commerce and does not directly obstruct, restrain or impose any direct burden upon interstate commerce;

(h) That the prices at which Carter Coal Company sells the coals produced by it have no direct effect upon interstate commerce;

(i) That the prices at which Carter Coal Company sells the coals produced by it to consumers within the State of production do not directly obstruct, restrain or impose any direct burden upon interstate commerce;

(j) That the prices at which Carter Coal Company sells the coals produced by it by sales consummated at the mouth of the mine for transportation to other States do not directly obstruct, restrain or impose any direct burden upon interstate commerce.

37. In making findings of evidentiary facts that are not supported by the evidence and are inconsistent with other facts found, as follows:

(a) Finding 43 to the effect that the use of bituminous coal in generating energy for the production of light, heat and power, is vital to the public welfare, and that, in view of the present importance of bituminous coal as a source of energy, it is of great importance to the public welfare that the distribution and marketing of bituminous coal both in interstate and intrastate commerce be not subjected to interruptions, dislocations, burdens or restraints; (and in [fol. 259] addition as indefinite and uncertain);

(b) Finding 54 to the effect that the industrial consumers without convertible equipment, because of the cost of conversion, will not ordinarily shift from coal to oil unless they are of opinion that the cost of coal will be considerably higher than that of oil over a considerable period of time; (and also as indefinite, uncertain and conjectural);

(c) Finding 64 to the effect that as a result of wages in the coal industries being only 59% of the total value of the product in 1929, whereas the general average for the other large mining industries was 21% and for the 48 large manufacturing industries was 18.2%, the pressure of competition acts with particular force to cause wage reductions in the bituminous coal industry;

(d) Finding 108 to the effect that operators necessarily cut their wage rates when they cut their prices, and to the effect that the closing down because of the 1927 strike of many mines in Illinois, Indiana, Ohio, parts of Pennsylvania and the organized states of the west substantially affected the distribution of coal in interstate commerce;

(e) Finding 110 to the effect that suspensions after that of 1922 laid upon consumers the burden of accumulating large stocks in anticipation of shortage;

(f) Finding 115 to the effect that price reductions forced wage rate cuts in a descending spiral; (and also as vague and indefinite);

(g) Finding 129 to the effect that between the years 1927 and 1933 practically the entire bituminous coal industry was engaged in a demoralizing competitive warfare, in which wage rate cutting followed price cutting in a continually descending spiral; (and also as vague and indefinite);

(h) Finding 140 to the effect that the closing of mines by reason of strikes and suspensions has usually involved the diversion or dislocation of commerce; (and also as vague and indefinite);

(i) Finding 158 to the effect that the great bulk of the total reserves consists of coal so low in grade, so deeply buried, so inaccessible, or in such thin beds that it has no present value and could be produced only at a great in-

crease over present costs; (and also as not supported by competent evidence and as conjectural);

(j) Finding 166 (and also as irrelevant and immaterial).

38. In refusing to make findings of evidentiary facts as follows:

(a) That strikes, caused by attempts on the part of employees to bargain collectively concerning wages, hours and conditions of employment, and the refusal of the employers so to bargain, have been due in large part to the desire and purpose of the miners' union to increase its power among the mine workers and its membership; (in connec- [fol. 260] tion with Finding 131);

(b) That the strikes in 1928 and 1932 were local and sporadic (in connection with Finding 109);

(c) That since 1922, viewing the nation as a whole, there has been no substantial stoppage in commerce in bituminous coal as a result of industrial disputes;

(d) That none of the strikes which have occurred since 1922 have had any material effect on the total national supply of coal.

(e) That any long continued application of price control in the bituminous coal industry would have to be accompanied by control of capacity of production in order to be permanently successful; and that price control alone would operate successfully only temporarily,—for about one year in the estimation of one witness.

(f) That it is a fact of common knowledge that each of the commodities described in Finding 165 is used or consumed in every state of the United States, and that the use of such commodities, or any of them, is indispensable to the industrial and economic life and to the health and comfort of the inhabitants of every state and of the District of Columbia.

(g) That the lowering of wage rates in connection with competition in the bituminous coal industry from 1923 through 1929 did not result, generally, in any lowering of the annual earnings of the men employed in the industry.

(h) That in addition to wage differentials and freight rates, quality of the respective coals and natural conditions

were factors in connection with the shift of shipments of coal from the fields north of the Ohio and Potomac Rivers to the fields immediately south thereof between 1923 and 1933 (in connection with Finding 118).

39. In refusing to admit in evidence plaintiff's proposed Exhibits Nos. 84 and 85.

For which errors the plaintiff, James Walter Carter, prays that the said decree of the Supreme Court of the District of Columbia, dated December 10, 1935, in the above-entitled cause, be reversed to the extent herein challenged by this appeal, and that the cause be remanded to the said Supreme Court of the District of Columbia with directions to enter a decree in favor of the said plaintiff in respect of the matters complained of herein upon this appeal, and for costs.

Frederick H. Wood, William D. Whitney, Richard H. Wilmer, Reynolds Robertson, Attorneys for Plaintiff-Appellant.

Receipt of copy acknowledged this 16th day of Dec., 1935. Karl J. Hardy, Joseph FitzGerald, Jr., Attys. for Carter Coal Co., et al. John Dickinson, Assistant Attorney General. W. B.

December 14, 1935.

[fol. 261] In Supreme Court of District of Columbia

Order as to Statement of Evidence—Filed December 16, 1935

Upon motion of counsel for the plaintiff, James Walter Carter, and the counsel for all of the defendants hereto consenting, it is by the Court this 16th day of December, 1935,

Ordered that the Statement of Evidence heretofore settled and filed on the 10th day of December, 1935, be, and the same hereby is, resettled and refiled as of December 16, 1935.

Jesse C. Adkins, Justice.

[fol. 262] IN SUPREME COURT OF DISTRICT OF COLUMBIA

ORDER TRANSMITTING ORIGINAL EXHIBITS—Filed December 16, 1935

On application of plaintiff-appellant, James Walter Carter, It is Hereby Ordered that Plaintiff's Exhibits Nos. 35-A to 35-H and 36 to 43, inclusive, offered and received in evidence in the above-entitled cause, being samples of various grades, kinds and sizes of coals, be transmitted by the Clerk of this Court to the United States Court of Appeals for the District of Columbia as original Exhibits in the above-entitled cause.

Jesse C. Adkins, Justice.

December 16, 1935.

[fol. 263] IN SUPREME COURT OF DISTRICT OF COLUMBIA

PRÆCIPE AND DESIGNATION OF RECORD—Filed December 16, 1935

The Clerk of the Court will please prepare the record on appeal in the above-entitled cause and include therein the whole of the record, that is, all pleadings, orders and documents of record, consisting of the following papers and proceedings:

1. Bill of Complaint for Injunction and Petition for Declaratory Judgment filed August 31, 1935.
2. Rule to Show Cause filed August 31, 1935.
3. Motion to Amend Bill of Complaint filed September 3, 1935.
4. Order filed September 3, 1935.
5. Return of Defendants Guy T. Helvering et al., to Rule to Show Cause filed September 16, 1935.
6. Return to Rule to Show Cause filed September 16, 1935.
7. Order Denying Preliminary Injunction filed September 19, 1935.
8. Motion filed September 19, 1935.
9. Order filed September 19, 1935.
10. Entry of Appearances filed September 19, 1935.
11. Stipulation filed September 19, 1935.
12. Stipulation filed September 20, 1935.

[fol. 264] 13. Joint and Several Answer of Defendants Guy T. Helvering et al., filed October 2, 1935.

14. Answer of Defendants Carter Coal Company and its Officers to Bill of Complaint, filed October 4, 1935.

15. Reply of Plaintiff to Separate Defense as set forth in Part II of Answer of Defendants Guy T. Helvering et al., filed October 5, 1935.

16. Motion to Advance and Specially Set Case for Hearing, filed October 5, 1935.

17. Memorandum of Points and Authorities in Support of Motion to Advance and Set Case Specially for Hearing, filed October 5, 1935.

18. Notice to Attorneys for Defendants that Motion and Memorandum of Points and Authorities will be Presented, filed October 5, 1935.

19. Memorandum of Points and Authorities on Behalf of Defendant Government Officers, Supporting Plaintiff's Motion to Advance but Opposing the Trial Date Requested by Plaintiff, filed October 9, 1935.

20. Order Advancing Case and Setting Specially the Date for Hearing, filed October 9, 1935.

21. Affidavit of James Walter Carter in Support of Preliminary Injunction, filed October 24, 1935.

22. Rule to Show Cause, filed October 24, 1935.

23. Return to Rule to Show Cause of Defendants Carter Coal Company and its Officers, filed October 28, 1935.

24. Return to Rule to Show Cause of Defendants Guy T. Helvering et al., filed October 28, 1935.

25. Order Continuing Rule to Show Cause, filed October [fol. 265] 28, 1935.

26. Order on Application for Preliminary Injunctions, Pendente Lite, filed October 30, 1935.

27. Order and Entry Showing Notation and Allowance of Appeal, filed October 30, 1935.

28. Docket Entry Showing Filing of Appeal Bond.

29. Assignment of Errors, filed October 30, 1935.

30. Præcipe and Designation of Record, filed October 30, 1935.

31. Memorandum of injunction undertaking, filed October 31, 1935, and memorandum of deposit of $15,000 as security.

32. Order approving additional security on undertaking filed November 14, 1935, and memorandum of deposit of $15,000.

33. Stipulation covering findings of fact and conclusions of law and statement of evidence, filed November 20, 1935.

34. Amendments to Bill of Complaint, filed December 10, 1935.

35. Order making amendments to Answer of Defendants Guy T. Helvering et al., of record, filed December 10, 1935.

36. Order making amendments to Answer of Defendants Carter Coal Company et al. of record, filed December 10, 1935.

37. Findings of Fact and Conclusions of Law, entered December 10, 1935.

38. Final Decree Denying Injunction, entered December 10, 1935.

39. Orders and entries showing notations and allowance [fol. 266] of appeals, filed December 10, 1935.

40. Plaintiff's Exceptions to Findings and Conclusions, filed December 16, 1935.

41. Exceptions of Government officer defendants to Findings and Conclusions, filed December 16, 1935.

42. Assignment of Errors of Government officer defendants, filed December 16, 1935.

43. Stipulation regarding citations on appeals, filed December 16 1935.

44. Docket entry showing Filing of Appeal Bond by James Walter Carter.

45. Assignment of Errors of James Walter Carter, filed December 16, 1935.

46. Order resettling and refiling Statement of Evidence.

47. Statement of Evidence, filed December 16, 1935.

48. Order transmitting original exhibits filed December 16, 1935.

49. This Præcipe and Designation of Record.

Frederick H. Wood, Richard H. Wilmer, William D. Whitney, Reynolds Robertson, Douglas L. Hatch, Attorneys for Appellant James Walter Carter.

Receipt of a copy of the foregoing Præcipe and Designation of Record is acknowledged this 16th day of December, 1935. The defendants Guy T. Helvering, individually and as Commissioner of Internal Revenue of the United States; M. Hampton Magruder, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; Clarence C. Keiser, indi- [fol. 267] vidually and as Acting Chief Field Deputy Col-

lector of Internal Revenue for Division No. 2 of the Collection District of Maryland; John B. Colpoys, individually and as United States Marshal in and for the District of Columbia; Homer S. Cummings, individually and as Attorney General of the United States; Stanley Reed, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and Leslie C. Garnett, individually and as United States Attorney in and for the District of Columbia, have no further præcipe or designation for record on appeal.

John Dickinson, Assistant Attorney General; F. B. Critchlow, Special Assistant to the Attorney General, Attorneys for Defendants Guy T. Helvering et al.

Receipt of a copy of the foregoing Præcipe and Designation of Record is acknowledged this 16th day of December, 1935. The defendants Carter Coal Company, George L. Carter as Vice-President and a Director of said Company; C. A. Hall as Secretary-Treasurer and a Director of said Company; John Callahan, Joseph W. Gorman and Walter S. Denham as Vice-Presidents of said Company, have no further præcipe or designation for record on appeal.

Karl J. Hardy, Joseph Fitz Gerald, Jr., Attorneys for Defendants Carter Coal Company et al.

[fols. 268 & 268½] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 269] IN SUPREME COURT OF DISTRICT OF COLUMBIA, HOLDING AN EQUITY COURT.

In Equity. No. 59374

JAMES WALTER CARTER

v.

CARTER COAL COMPANY et al.

Statement of Evidence

At the hearing of the above-entitled cause, before Mr. Justice Adkins, begun on Tuesday, October 29, 1935, the

following proceedings were had, evidence offered and given, rulings made by the Court, and exceptions taken by the plaintiff and by the defendants and noted by the Court. Thereupon, to maintain the issues on their part joined, the plaintiff and defendants offered in evidence:

[fol. 270]. (NOTE—Figures in parentheses indicate pages in the original transcript of the evidence.)

(160) JAMES WALTER CARTER, called as a witness in his own behalf, having been first duly sworn, testified:

Direct examination.

By Mr. Whitney:

(161) My address is Stevenson, Baltimore County, Maryland. I am a citizen of the United States and of the State of Maryland. I am the President and a director of Carter Coal Company, a corporation organized under the laws of Delaware in December, 1912. The capital stock of Carter Coal Company is composed of 30,000 shares of Class A Common Stock (of $1 par value), 10,000 shares of Class B Common Stock (of $1 par value) and 34,187 shares of Preferred Stock (of $100 par value). The Class A Common Stock and the Preferred Stock currently have voting rights and the Class B Common Stock is without voting rights. (162) I own 15,000 shares of Class A Common Stock and 9,733 shares of Preferred Stock.

The directors of Carter Coal Company are, and were on August 30, 1935, C. A. Hall, George L. Carter and myself. The officers of the Corporation are, and were on August 30, 1935, myself, President; George L. Carter, Walter C. Denham, John Callahan and Joseph W. Gorman, Vice-Presidents; and C. A. Hall, Secretary-Treasurer.

(163) [There were stipulated into the record the following exhibits: Plaintiff's Exhibit No. 1—Certificate of Incorporation of Carter Coal Company; Plaintiff's Exhibit No. 2—Certificate of Amendment of Certificate of Incorporation of Carter Coal Company, certified as having been filed [fol. 271] September 28, 1922; Plaintiff's Exhibit No. 3—(164) Certificate of Amendment of Certificate of Incorporation of Carter Coal Company, certified as having been

filed March 15, 1933; Plaintiff's Exhibit No. 4—By-laws of Carter Coal Company.]

Carter Coal Company is engaged in the business of mining and selling coal. It owns and operates mines in McDowell County, in southern West Virginia, and in Tazewell County, Virginia. It also owns coal mines in Knox and Bell Counties, Kentucky, which it is not now operating.

I have read the Bituminous Coal Conservation Act of 1935 and am familiar with it. The mines of Carter Coal Company in McDowell County, West Virginia, are located within District No. 7, as provided in the Act. The names of the mines of Carter Coal Company in McDowell County are Olga No. 1, Olga No. 2, Caretta and (165) Thelma, and the name of the mine in Tazewell County, Virginia, is Seaboard.

At the time the Act was signed by the President, on August 30, 1935, I addressed a letter to the directors of Carter Coal Company and caused a meeting of the Board of Directors to be held to act upon it.

[The original letter was identified and offered and received in evidence as Plaintiff's Exhibit No. 5.]

(166) The principal office of Carter Coal Company is located in Washington, D. C.

[There were stipulated into the record the following exhibits: Plaintiff's Exhibit No. 6—Certified copy of min-
[fol. 272] utes of meeting of Board of Directors of Carter Coal Company held August 30, 1935; and Plaintiff's Exhibit No. 7—Certified copy of minutes of meeting of stockholders of Carter Coal Company held August 30, 1935.]

(167) In my opinion the expense of the Bituminous Coal Code to Carter Coal Company will require the expenditure or loss by that company of upwards of $3,000, and the business of Carter Coal Company is such that if the Company does not accept the Code and is required to pay a tax upon all sales at the mine, this will require an expenditure of upwards of $3,000.

(170) After the stockholders' meeting on August 30, 1935, I consulted counsel and was advised that there was no recourse left to me as a stockholder to prevent the Corporation taking an action which I do not believe proper, other than to bring suit which I did bring and which is now

pending. I consulted with counsel on the same subject matter during the pendency of the Act in Congress and prior to its enactment on August 30, 1935.

Cross-examination.

By Mr. Critchlow:

I own 15,000 shares of Class A Common Stock of Carter Coal Company and the other 15,000 shares are held by George L. Carter, my father. (171) The 10,000 shares of Class B Common Stock have no voting rights and are held by the Consolidation Coal Company and/or its trustees or [fol. 273] receivers.

(172) I own 9,733 shares of Preferred Stock; Margaret Woolfoll Carter, my wife, holds 5,100 shares; George L. Carter, my father, holds 9,948 shares; Mayetta W. Carter, my mother, holds 9,406 shares. At the stockholders' meeting on August 30, 1935, my father held the proxy of my mother.

(173) In the case of Carter Coal Company, the Preferred Stock, pursuant to the Certificate of Incorporation, are entitled to voting rights when dividends have been in arrears for four quarterly dividend periods. (175) I believe the last dividend on the Preferred Stock was paid in August, 1932. At the aforesaid stockholders' meeting of August 30, 1935 the vote for the resolution was: George L. Carter, 15,000 shares Class A Common and 9,948 shares Preferred; and Mayetta W. Carter, 9,406 shares Preferred. (176) The vote against was: Myself, 15,000 shares Common and 9,733 shares Preferred and Margaret Carter, 5,100 shares Preferred.

On August 30, 1935, Mr. Hardy was counsel for Carter Coal Company. I consulted with reference to bringing this suit with the firm of Cravath, de Gersdorff, Swaine & Wood. I consulted with said firm prior to August 30, 1935. I prepared the letter to the directors (Plaintiff's Exhibit No. 5) upon the advice of counsel. The resolutions contained in the minutes of the directors' and stockholders' meetings held on August 30, 1935 were prepared by my counsel (177) on August 30 in the morning. The directors' [fol. 274] meeting was attended by all of the directors.

Mr. Hall is not related to me in any way nor does he own any stock in the Corporation. Prior to the meeting, there

had been discussion between myself and my father. (178) There had also been discussion between myself and my wife. My father's position was as reflected in the minutes. He agreed with me that the Act is economically unsound and unconstitutional but he was not willing that the Corporation should subject itself to the penalty tax provided for in the Act. Prior to the enactment of the Act, I did what I could to prevent its enactment and hoped that it would not be enacted. At all times while it was before Congress I discussed it with my father and with many other people. (179) After the Act had been passed by both Houses but before it was signed by the President, I discussed with my father what his action would be. He knew that I was going to discuss the situation with my counsel. I discussed the matter with counsel throughout the entire pendency of the legislation in Congress.

(182) I have been President of Carter Coal Company since March, 1933. (183) As President, I have been responsible for its management and have performed the duties imposed upon me. My father has been interested in the details of the management but has not taken as active a role as I have. (184) Before calling the meetings on August 30 I spoke to my father about them. The waivers of notice were prepared by my counsel shortly before prior [fol. 275] to the meetings, but do not know on what date. (185) My counsel advised, since I knew my father was not going to oppose joining the Code, I should cause these meetings to be held to properly record the differences of opinion that existed between my father and mother the controlling stockholders and myself. (187) The directors' meeting was held in the sales office of the Corporation in New York City. My counsel was present. No other counsel was present. I told my father about calling the meeting within 48 hours before. He lives in Washington, D. C. and came to New York for the meeting. (188) Mr. Hall lives in Washington, D. C. and I do not recall whether he made a special trip to New York for the meeting.

(189) I urged my theory to Mr. Hall but he was swayed by the opinions of my father. Mr. Hall is a salaried employee of the Corporation.

There were present at the stockholders' meeting, my father, myself, my wife, my counsel and Mr. Hall. The meeting was held in the sales office of the Corporation in

New York City. My wife did not make a special trip to New York for the meeting. (190) I did not have a proxy from her. (191) The meetings were held in the afternoon, commencing at 3 P. M., the stockholders' meeting one hour after the directors' meeting.

Walter C. Denham is one of the Vice-Presidents and owns no stock in the Corporation.

(192) There was no discussion at the directors' meeting other than as shows in the minutes. The same is true with [fol. 276] respect to the stockholders' meeting. It was not possible for me to get together with the other members of my family and determine the policy of the Corporation. It was necessary for me to come and ask the Court to determine the policy the Corporation should take. (193) Prior to August 30 I had discussed with my father the question of a lawsuit against the Corporation. He did not agree with me as to the course the Corporation should pursue. He was afraid to have the Corporation run the risk of paying the large amount of tax.

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(237) JAMES WALTER CARTER, a witness theretofore called in his own behalf, and who had been duly sworn, was recalled and testified further as follows:

Further direct examination.

By Mr. Whitney:

[There were offered and received in evidence: Plaintiff's Exhibit No. 8—Copy of Delaware statute in re management of Corporation by Board of Directors; (238) Plaintiff's Exhibit No. 9—Copy of mining laws of West Virginia, Plaintiff's Exhibit No. 10—Copy of mining laws of Virginia.]

Substantially all of the coal mined in Carter Coal Company mines is sold f. o. b. mines. Substantially all of the coal mined in the Carter Coal Company mines is sold and transported into states other than the state in which produced. (239) In the year 1934 something over 50,000 tons were sold by the Corporation in the state in which it was [fol. 277] mined. About 60% of the coal produced by Carter Coal Company moves into the inland western market and the ports on the Great Lakes; approximately 20% moves to tidewater ports on the Atlantic seaboard, and another 20%, approximately, moves into the southeastern

and the North Atlantic states. By "inland western market" I mean Illinois, Indiana, Ohio, Wisconsin and Michigan. The South Atlantic and the North Atlantic states would include Virginia, West Virginia, North and South Carolina, Pennsylvania, New Jersey, Delaware, Maryland and the District of Columbia. By coal moving to tidewater ports I mean that coal which would be shipped to ports along the Atlantic seaboard for dumping into vessels for trans-shipment to various ports.

(240) I have had prepared under my supervision a schedule showing the taxes paid by Carter Coal Company in the year 1934 to individual states. [This tabulation was offered and received in evidence as Plaintiff's Exhibit No. 11.] In addition, in 1934, Carter Coal Company paid to the State of West Virginia, to the State Compensation Fund, something over $78,000. The Corporation paid altogether to the State of West Virginia in taxes and workmen's compensation assessments approximately $170,000 in 1934.

(241) The business of Carter Coal Company is generally divided into two parts, that of producing coal at the mine and that of selling it. The men principally engaged in directing the activities in the one part are not engaged in [fol. 278] directing the activities in the other. The two operations are essentially different. One is a problem of production, the other of merchandising. I have been familiar with the coal mining business since about 1915. I have been President of Carter Coal Company since March, 1933. I served on a code authority during the National Industrial Recovery Act.

(242) As to mining problems, every mine is different from every other. The coal occurs in seams and mines are necessarily opened where coal exists and are operated under the conditions that are found. These conditions are not duplicated exactly in any two areas. Seams of coal might be visualized as layers of chocolate in a cake, the intervening strata being generally composed of slate, shales, sandstone or fire clay. The seams may occur either above the surface of the ground or below. In those seams that are above the surface, mining is simply going into the side of the cake (using the example) and extracting the coal. Where the seam of coal occurs below the surface, it must be reached by a shaft or shafts of some type. Another

class of mining, called strip mining, is used where the coal occurs very near the surface. The soil above the seam of coal can be removed by some stripping operation as with a steam shovel so that the coal can be scooped up with a steam shovel. (243) It is generally true that the opening of a mine where the coal has to be reached by a shaft would be more expensive than the opening of a mine where the coal is nearer the surface. In the case of a shaft mine, [fol. 279] the first problem is to reach the seam of coal. This is done by sinking shafts from the surface to the seam, through which the coal mined will be brought to the surface, the mines will be ventilated, and the men and supplies will be raised and lowered.

Carter Coal Company operates mines of all types except strip mines.

The process of mining the coal might be likened to the driving of tunnels through the seam of coal and then extracting the intervening blocks of coal. The pattern of the tunnelling and the method of extracting vary in accordanee with the method of mining which will be determined by the peculiar conditions in the area in which the mine is located. Maps of the shafts and tunnels are prepared, some for the Corporation's purposes and others as required by state laws. There are many factors which will influence the determination of the method of mining. These include the character of the seam of coal, the structure of the coal, its thickness, the strata immediately above and below it, and any restrictions that may be imposed by the state laws. The tunnels vary in width and in character, (244A) the width being determined by the use and the purpose for which driven. In mining parlance, they may be designated as entries, cross-entries, break-throughs, or rooms. The tunnels vary as to size within each mine based upon the purpose to which put and vary in different mines in accordance with the conditions peculiar to those mines. State laws [fol. 280] require that on haulage ways in tunnels there be ample clearances for men passing so that they may not be injured by any cars carrying the coal from the place at which broken down to the mouth of the mine. State laws also impose regulations as to providing at specific distances safety places where men may stand. A constant circulation of air throughout the mines is necessary for ventilation and also in mines where dangerous or explosive gases may be

generated (245) in order that these gases may be diluted and swept away. State laws are exacting as to requirements for ventilating mines. They specify the amount of air necessary, and the number of men that may be permitted to work in any current of air. State officials check the adequacy of the ventilation at periodic intervals. State laws also require the employment of men to check the mines before any men may enter them to determine that there are no dangerous accumulations of gas. These employees must hold certificates from the state as to their competency. In addition, any well-managed company will take many other precautions that are not required by state laws. Carter Coal Company, in addition to complying with the state laws as to the adequacy of the ventilation, employs men to go into the mines every day and collect samples of the air so that chemical analyses may be made. (246) Coal dust accumulations in mines is a factor of danger in the mining process and the coal dust must be either removed or kept in a condition that will not be injurious. State laws require [fol. 281] that any accumulations of dust in mines be removed or made safe by wetting them down or by the application of rock dust. Every man who goes into the mine and every man who comes out is recorded. State laws require this. There are emergency exits from mines including those below the surface. These are required by state laws. (247) The states require that each mine employing in excess of a small number of men be under the direction and management of an experienced and qualified man who shall have taken examinations required by the state as to his competency and ability. This man is entirely in charge of all operations under ground. He has many duties to perform imposed by the state for the safety of the men. He sees that dangerous slate or rock or strata that might fall on the men is made safe or removed. He supervises the proper timbering of the mines, the general ventilation and generally all the other activities within the mine. Large mines are divided into sections under the direction of sub-foremen. The sub-foremen employed by Carter Coal Company are generally men holding certificates from the state as to competency as foremen.

(248) Within the mine there are many specialized activities,—for instance, timbers to be set and tracks over which small cars may travel to be laid. The coal is broken down before it can be put into the conveying device to take

it to the mouth of the mine. The coal must be physically lifted into the mine cars or other conveying devices. The [fol. 282] coal is cut in the seams by machines and after it is cut it is broken down by an explosive. The explosives used are transported and stored in accordance with state laws. After the coal is exploded, men called coal loaders or miners load the coal into small cars or other conveying apparatus by which it is carried to the mouth of the mine. (249) Approximately half the men employed in the mines are coal loaders or miners who are piece-workers and are paid a specified amount per ton. This is generally true throughout the industry. The description I have given is broadly true of the normal shaft mine.

After the coal reaches the mouth of the mine it may be put into railroad cars or will go into a screening plant where it will be prepared for market. The latter happens in the case of the majority of mines. The screening plant or treating plant is an apparatus in which there are a number of screens over which the coal passes from a hopper as it comes from the mines, and is screened into various sizes. These sizes may, in some cases, be washed. (250) In many cases, certain of the sizes of coal will be treated with chemical preparations to make them dustless and more attractive to buyers. The coal as it leaves the mine is usually referred to as run-of-mine coal or mine-run coal.

Carter Coal Company has different kinds of surface plants for preparing the coal for market. About 90% of all the coal produced by the Corporation comes from two [fol. 283] mines at which there are substantial preparation plants and at which the coal is sized into a number of different sizes. The smaller mines are operated with less elaborate plants for the preparation of the coal. The great majority of the men employed work under ground but a substantial number are engaged in operating the large preparation plants on the surface.

(251) Referring to the Bituminous Coal Conservation Act of 1935, which contains a provision that those who adhere to the Code provided for therein shall receive a 90% credit against a tax equal to 15% of the sales price at the mines, in my capacity as President of Carter Coal Company I consider that the Corporation could not afford to pay such tax of 15% and continue to compete with its competitors or remain in business if those competitors paid

a smaller amount of tax. I have prepared a statement giving the principal figures for the Corporation's activities in the year 1934. [The statement was then offered and received in evidence as Plaintiff's Exhibit No. 12.]

If Carter Coal Company could not remain in business it would be compelled to close its mines and to discharge those people who work for it numbering about 3,000. With their dependents this would amount to between 10,000 and 12,000 people.

(252) The Corporation has customers with whom it has been dealing with a degree of regularity. The closing of the mines would cause the loss of the good will and the [fol. 284] business of these customers which it would be difficult and costly to regain if the mine should ever be reopened. The corporation has been in business since 1912 and has always operated under the same name. At one period the Consolidation Coal Company owned all of the Common Stock of Carter Coal Company and during that period there was an operating agreement between the Consolidation Coal Company and Carter Coal Company pursuant to which Consolidation carried on certain of the operations of Carter Coal Company in the name of Consolidation. The books, records and the corporate life of Carter Coal Company always, however, continued in existence. (253) During that period the coal produced at the Carter Coal Company mines was sold at times under the trade names now in use by the Corporation and at other times under trade names employed by Consolidation. The registered trade names of Carter Coal Company now are Olga, Caretta and Thelma. These names are applied to particular coals produced at particular mines.

Referring again to the Bituminous Coal Conservation Act of 1935 and the 15% tax provision, in my opinion, in view of its cash and general working capital position, Carter Coal Company could not afford to pay such tax and continue operating without the funds that would be tied up during the period of time required to bring a suit for recovery. I have been advised by counsel that a very considerable amount of time would be required to secure the [fol. 285] determination of such a suit. The Corporation could not operate during that time.

(255) As President of Carter Coal Company I have received a notice from the National Bituminous Coal Com-

mission and several documents enclosed therewith. [The following exhibits were then offered and received in evidence: Plaintiff's Exhibit No. 13—Notice from Acting Deputy District Secretary of the National Bituminous Coal Commission calling meeting of members of District No. 7 to be held on October 30, 1935; (256) Plaintiff's Exhibit No. 14—Same as Plaintiff's Exhibit No. 13; Plaintiff's Exhibit No. 15—General Order No. 1 of Coal Commission; Plaintiff's Exhibit No. 16—General Order No. 2 of Coal Commission; Plaintiff's Exhibit No. 17—General Order No. 3 of Coal Commission.]

(257) I have read the Bituminous Coal Code and am familiar with it. I have prepared a map of the United States showing the approximate location of the minimum price areas and districts provided in the Code. [The map was then offered and received in evidence as Plaintiff's Exhibit No. 18.] The numbers upon the map represent the districts substantially as described in the Code. The principal mines of Carter Coal Company are located in District No. 7, which corresponds approximately with southern subdivision No. 1 of Division I of the old NRA code. The name of that district, for ordinary purposes, is the Smokeless District. Approximately 90% of the coal produced in the United States is produced in minimum price area No. 1, colored in yellow on the map.

[fol. 286] (258) I have received from the National Coal Association what purports to be a table prepared by the Bureau of Mines showing the production of bituminous coal by districts, as defined in the Act. [The table was then offered and received in evidence as Plaintiff's Exhibit No. 19.]

I believe that it would be disadvantageous to Carter Coal Company to join the Code. (259) There are a number of reasons why, in my opinion, it is disadvantageous to Carter Coal Company to join the Code. I do not believe it will be advantageous for the Corporation to place in the hands of boards composed of its competitors papers having to do with the most intimate details of the transactions of the Corporation, such as its contracts, copies of orders, invoices, and other similar papers that may be required. I do not believe it would be advantageous for the Corporation to enter into the new relationships that would be imposed upon it with respect to other members of the

Code. I do not believe it would be advantageous for the Corporation to subject itself to suits for damages which might accrue to other members of the Code from acts which the Corporation might commit or fail to commit as a Code member. (260) I do not believe that it would be advantageous for the Corporation to agree to limit its right of contract in the manner that it would agree to if it became a member of the Code. I do not believe the Corporation should subject itself to the risk of suits for violation of the anti-trust laws of the states or of the nation, which I [fol. 287] believe it would do if it became a member of the Code. I do not believe that it would be to the interest of the Corporation to agree to accept as the minimum prices of the products that it has to sell the prices that would be fixed by boards of its competitors or agencies of the Federal government. I do not believe that the Corporation should agree to limit its opportunities for profit by binding itself to accept as the maximum prices it might receive for products that it has to sell prices fixed by agencies of the Federal government or by groups of its competitors—groups composed substantially of and controlled by its competitors. I do not believe that the Corporation should sacrifice its good name by entering into an agreement under which it would pledge itself most certainly to breach existing contracts which it has entered into in good faith with people with whom it has dealt.

The payment of expenses by Code members is a material consideration in my mind. This would add to the cost of producing coal by the Corporation. (261) During the period of the National Industrial Recovery Act Carter Coal Company contributed as assessments something over $20,000. This covered a period of about 20 months. I believe the assessments under the proposed Code would be equally costly.

(267) Carter Coal Company is confronted with two distinct types of competition—competition within the indus- [fol. 288] try from other producers of coal, and competition from without the industry from competing fuels, such as natural gas, hydro-electric power and oil. The Corporation has competition from anthracite, which is simply one of the various kinds of coal produced in the United States. All kinds of coal in general compete to a certain extent with each other. Some bituminous coal producing areas are

more directly in competition with anthracite than are others. There is such direct competition in the case of Carter Coal Company and all other companies producing coal in the district where the Carter Coal Company mines are located.

(268) I have had prepared under my personal supervision a chart and also a supporting table of figures purporting to show production of coal in the United States from 1822 to 1934. [The chart was offered and received in evidence as Plaintiff's Exhibit No. 20. The table was offered and received in evidence as Plaintiff's Exhibit No. 21.] The decline in the production and consumption of coal in the United States since 1925-1926 is due primarily to two causes. (269) The first is increased efficiency in the burning of coal and in its use and the second is competing fuels and forms of energy. Increased efficiencies in the burning process and in apparatus with which coal is burnt or consumed causes decrease in consumption. I have had prepared under my supervision four exhibits. [The exhibits were then offered and received in evidence as follows: (270) Plaintiff's Exhibit No. 22—Table entitled "Electricity [fol. 289] Produced and Similar Coal Fuel Capacity of Generators in Public Utility Power Plants"; Plaintiff's Exhibit No. 23—chart entitled "Trends in Fuel Efficiency in the United States from 1917-1933, Showing Use by Railroad Fuel, Electric Power, Blast Furnaces and By-Product Coking"; Plaintiff's Exhibit No. 24—Statement entitled "Indicators of the Effect of Fuel Economy on Consumption of Coal Per Unit of Performance since the World War"; (271) Plaintiff's Exhibit No. 25—Photostatic copy of chart taken from page 64 of "Modern Combustion, Coal Economics and Fuel Fallacies" by Clarence V. Beck.]

Based on my experience as a coal operator, I believe that as the price of coal advances efforts to increase efficiency in its use to bring about a further decrease in its consumption will inevitably occur. (272) In my opinion, based on my experience as a coal operator and in addition on my experience as a member of a code authority under the National Industrial Recovery Act, the present Code will result in raising prices above their present levels and generally higher than the level of prices that prevailed under the NIRA. (273) Under the NIRA code the prices fixed were minimum prices and as a practical matter such

prices were fixed about as high as it was thought the traffic could bear.

By the Court:

NRA prices were higher than prior prices. There was generally an increase in price levels in the case of all com- [fol. 290] modities, including coal, at about the time the N. I. R. A. began to be operative. The operation of the code undoubtedly increased prices for coal. A part of the increase occurred as a result of advances in the wages of mine employees.

By Mr. Whitney:

In my capacity as a member of a code authority under the NIRA and in my business as a coal operator, I considered it a part of my business to follow the trend of prices generally in coal. (274) While the NIRA was in effect, in so far as I know, producers generally adhered to the prices and to the rules and regulations promulgated under the NIRA. That was true generally throughout the period of the act up to the day of the decision by the Supreme Court of the United States which invalidated it on May 27, 1935.

I have had prepared under my direct and personal supervision six exhibits with respect to the increased use of competitive fuels. [These exhibits were offered and received in evidence as follows: (275) Plaintiff's Exhibit No. 26—Chart showing "Percentage of Energy Supply of the United States derived from Coal, Oil, Gas, and Water Power, 1889 to 1933"; (276) Plaintiff's Exhibit No. 27— [fol. 291] Table entitled "Relative Rate of Growth of Coal and Other Sources of Power, for the years 1909 to 1933"; Plaintiff's Exhibit No. 28—Chart showing change in consumption of coal from 1917 to 1933; Plaintiff's Exhibit No. 29—Table entitled "Changes in United States Consumption of Bituminous Coal by such Classes of Consumers as Report Currently, and by all other Consumers, 1929 to 1933"; Plaintiff's Exhibit No. 30—Table entitled "Annual Supply of Energy from Mineral Fuels and Water Power in the United States"; Plaintiff's Exhibit No. 31—Map showing oil pipe lines and natural gas pipe lines in the United States.]

This increase in the use of other classes of power has made consumers of coal very much aware of the availability of other fuels for their uses.

(277) I have obtained from the National Coal Association a list of examples of coal tonnage lost to competing forms of fuels and energy which was compiled in 1934 by the National Coal Association, as an exhibit to the testimony of the Secretary of that Association for use in a hearing in which he represented the coal industry in connection with freight rate matters. Two supplements to that list were compiled at my request by the National Coal Association showing recent conversions from coal to oil or gas that had come to the attention of the Association. I do not suggest that the list covers all or necessarily any great percentage of the loss of business through competing fuels. [fol. 292] It only purports to represent specific instances that have come to the attention of the National Coal Association. [The statements containing the list referred to and two supplements thereto were marked "Plaintiff's Exhibit No. 32 for Identification". This exhibit was subsequently (514) offered and received in evidence, with the statement that the method in which the list was acquired was through inquiry made by the National Coal Association to a great number of producers and is a compilation of such reports by such producers.]

(278) Changes in the price of coal have a substantial influence on the use of these competitive forms of power. Minor changes in the price of coal have such an influence in certain classes of business, particularly by consumers of large quantities of coal for steam-raising purposes whose plants can be converted to some other form of fuel such as oil or gas. I have practical experience of my own that minor changes in the price of coal influenced customers in turning to other sources of fuel. The equilibrium between coal and oil prices is a very delicate one. A comparatively few cents change in the delivery price of coal would be enough to warrant a large buyer of coal to convert his plant to some other fuel, the burning of which would result in lower operating cost for his plant or business. (279) About half, perhaps more, of the business of Carter Coal Company goes to large users of coal, either for metallurgical purposes or for generating steam in comparatively large

plants. Roughly speaking, the proportion of the production of all bituminous coal that goes to such large users would be approximately half. The balance of the coal would go as sized coal to what is generally referred to as [fol. 293] domestic users, such as small householders, small heating plants and buildings generally.

(280) Anthracite coal and bituminous coal are not separate industries. They are simply varieties of coal. There are infinite varieties of coal, varying in their chemical structure and their physical structure, and anthracite is one variety. The products of Carter Coal Company and of many other bituminous coal companies as well, compete with anthracite coal in innumerable markets. Anthracite is sold in the northwestern area, in New York, and in the North Atlantic states, and in New England. In many of these areas the coals of Carter Coal Company are sold for the same purposes that anthracite is sold for. I have had prepared under my direct supervision a map purporting to show states in which 100,000 or more tons of anthracite coal were distributed from April, 1928 to March 1, 1929. I have obtained from the government department a tabulation entitled "Distribution of Pennsylvania Anthracite for the Coal Year April 1, 1928 to March 31, 1929" containing the figures relevant to the map. [(281) The map was offered and received in evidence as Plaintiff's Exhibit No. 33 and the tabulation relevant to the map was offered and received in evidence as Plaintiff's Exhibit No. 34.] More than 98% of anthracite coal is produced in the State of Pennsylvania.

(282). In the coal industry, captive mines are those that are owned or controlled by companies which themselves [fol. 294] consume a substantial part of the output of those mines. The principal types of companies owning captive mines are the steel companies, certain of the chemical companies, the railroads and in a few instances, public utility plants. It has been the experience of the coal industry that large consumers will buy and operate their own mines when the price of coal becomes so high that it is more profitable to them to produce at controlled mines the tonnages required by them. This is a substantial element in competition with coal producers such as Carter Coal Company because the users of coal who do operate captive mines and who, upon a rise in the coal market, would acquire and operate them

are the largest customers of the commercial producers. As their business is lost, further pressure is exerted on an already declining market for coal.

(283) Wagon mines are those mines that are operated by a few people in times of prosperity, or those mines that are operated by people whose primary occupation in life is something other than mining coal. For example, in Ohio there might be a farmer on whose land would occur a seam of coal near the surface or in a hillside from which coal might easily be extracted. If the demands of his farm did not interfere he might mine a small quantity of coal, put it in his own farm truck and take it to the nearest town to sell it. I myself did not come directly in contact with wagon mines in any appreciable degree under the NIRA but I [fol. 295] understand that in those districts where wagon mines are most numerous, that is, in those areas near the large consuming cities in the west and northwest, the problem of wagon mines was a very difficult one for the code authorities. As a practical matter, it is very difficult to control or regulate such operations.

There is competition between districts that produce coal. (284) Those districts that are nearest the points of consumption have an advantage in transportation costs that is denied those districts that are at a greater distance from such points of consumption. Competitive advantages accrue to those mining areas in which the natural conditions of mining are more favorable. Geological conditions determine the method of mining and the cost with which the coal may be extracted. There are great ranges and variations in the qualities of coal in different areas of the country. To a certain extent in any market that may be reached by coal of any particular type, that coal competes with all other coal. Coals of similar chemical and physical structure produced in different areas are most directly competing with each other. (285) Freight rates for carriage by rail have a substantial effect upon competition because generally about half the delivered price of coal is represented by transportation costs.

Within each district, even within mines themselves, there are variations in the character of the coal and in its chemical analysis. Competition exists between mines within each [fol. 296] district. Assuming that the same care is taken in the preparation and in the cleaning of the coal, and as-

suming further that the same methods for preparing the coal for market are followed, if substantially the same quality of coal is found inside two mines it will invariably be the case that that coal as finally produced and shipped will be of the same quality from the point of view of salability. There may exist variations in mechanical equipment at the preparation plants that would give one mine a competitive advantage in the quality of coal prepared for market as against another mine.

(286) I do not know how many different kinds and sizes of coal there are on the market in the United States, but under the NIRA code a tabulation was prepared of the coals being marketed in what was known as Division I and that was said to include more than 27,000 different sizes and varieties and prices of coal. Division No. I under the NIRA code was substantially smaller in area and in number of mines than price area No. 1 under the present Code. Coals are classified generally speaking upon their chemical analyses. The factors included in the chemical analyses upon which classification of coals would be based are generally the volatile content, the carbon content, the amount of ash and sulphur, and the heat-producing value of the coal. There is a very great range in those factors. The coal with the least volatile content and which is also the [fol. 297] firmest in structure is anthracite coal. At the bottom of the list would be lignites or peats, which are semi-coals. Between the lignites and peats and anthracite they are all variations. (287) Below the anthracite coals in volatile content come the so-called smokeless coals produced largely in southern West Virginia and in certain areas in Pennsylvania. The great bulk of coal in the country is of the higher-volatile character. To a degree, those very expert might identify particular coals from looking at them, but the real determination would be made upon chemical analysis. Coals vary in hardness, in fracture and in color. I have various samples of coal of different kinds, all in the same size, known in the coal trade as nut or chestnut size. [There were submitted and received in evidence the following eight exhibits, being samples of coal from various mines, including Carter Coal Company mines: Pennsylvania nut, anthracite, Wyoming District—Plaintiff's Exhibit 35A; Pennsylvania nut, anthracite, Lehigh District—Plaintiff's Exhibit 35B; West Virginia nut,

Winding Gulf Field, Beckley Seam—Plaintiff's Exhibit 35C; West Virginia nut, Olga, from Pocahontas Field, No. 4 Seam—Plaintiff's Exhibit 35D; West Virginia nut, New River Field, Sewall Seam—Plaintiff's Exhibit 35E; West Virginia nut, from Pocahontas Field, No. 3 Seam—Plaintiff's Exhibit 35F; Fairmont nut, from Fairmont Field, West Virginia, Pittsburg Seam—Plaintiff's Exhibit 35G; Logan nut, from Logan Field, West Virginia, No. 5 Block—[fol. 298] Plaintiff's Exhibit 35H.] (289) The purpose of introducing these is to show the general similarity and at the same time slight differences in the fracture of the coal and its shape.

I have also brought some samples of various sizes of coal from one mine, including mine-run coal, and the various sizes into which mine-run coal would be screened, including lump coal, egg coal, two sizes of stove, chestnut, pea and quarter-inch slack. [(290) These exhibits were offered and received in evidence as follows: Sample of run-of-mine coal—Plaintiff's Exhibit No. 36; sample of lump coal—Plaintiff's Exhibit No. 37; sample of egg coal—Plaintiff's Exhibit No. 38; sample of stove coal—Plaintiff's Exhibit No. 39; sample of stove coal—Plaintiff's Exhibit No. 40; sample of chestnut coal—Plaintiff's Exhibit No. 41; sample of pea coal—Plaintiff's Exhibit No. 42; sample of slack coal—Plaintiff's Exhibit No. 43.]

There is a difference in the amount of ash that various coals contain. (291) There is also a variation in the number of heat units contained in various classes of coal and in the amount of sulphur and the amount of water. Certain coals are adapted to certain uses and others to other uses.

The Carter Coal Company operates mines in the Pocahontas No. 4 Seam, the mines in that seam being known as Olga No. 1 and Olga No. 2. It operates a mine in the War Creek or Beckley Seam, called Caretta. It operates a mine [fol. 299] in the Davey Sewall Seam, called Thelma. All of these mines are in McDowell County, West Virginia. (292) It operates a mine in Tazewell County, Virginia, in the Lower Seaboard Seam, the mine being named the Seaboard. All those coals are sold under their own trade names which follow the names of the mines.

The various sizes of coal evidenced by Plaintiff's Exhibits No. 37 through No. 43 are sometimes combined and sold

two or more together. Mines having preparation plants prepare coal in those sizes for which a market demand exists. The sizes are generally as evidenced by the exhibits although sizing will vary at different mines and in different fields in accordance with local conditions. The sizes of coal being prepared at a mine may change even during the course of one day's operation to meet the demand of some particular customer. All of the different sizes of coal must be simultaneously marketed. (293) Generally speaking, very little coal is stored at the mines. Carter Coal Company has two storage yards at two of its mines at each of which yards between 50,000 and 100,000 tons of coal may be stored. It is not generally true that storage yards exist at mines. The necessity to market all the different sizes of coal produced at any one moment at a mine is less if there is a storage place in which any size may be kept until a demand for it exists. Generally speaking, all coal must be sold currently with its production.

There are perhaps in the entire United States 40,000 or more sizes, varieties and prices of coal. Under the [fol. 300] National Industrial Recovery Act the various code authorities under the Bituminous Coal Code made an effort to set different prices for each different kind, class and variety of coal. (294) Different prices were set for different mines and for the different sizes of coal produced by each mine. Variations in the quality of the coal produced in the same mine occurred in accordance with variations in its sizing. Different prices were attempted to be set to represent those variations.

In any particular consuming market the prices for coal of the same size and the same quality would be generally the same. There may and will exist considerable variations in the delivered price of coal in various markets based and determined largely upon the transportation cost from the mines to those markets. The principal factor in determining the variation of prices as between different markets would be the cost of transporting the coal from the mines, since the f. o. b. mine price would be the same.

(295) A similar effort to the direction in the Bituminous Coal Conservation Act that the district boards and the Coal Commission should coordinate prices was made under the National Industrial Recovery Act, pursuant to which it was called correlating prices. As a practical matter, it is very

difficult of achievement to secure a perfect or even equitable price relationship between all the different sizes and varieties of coal at all the points of consumption in the United [fol. 301] States as of any particular moment. Trade journals carry prices of coals that may be charged in different consuming markets which are somewhat indicative of the level of prices in those areas. These prices in trade journals are simply indexes of a general price structure. (296) Actual transactions would normally fluctuate either above or below such listed prices. Most buyers of coal from Carter Coal Company are well-informed with respect to coal. Most buyers have their own ideas of value and that part of the Corporation's business with respect to marketing coal after it is mined is devoted to securing the best prices obtainable for such coal. Buyers of large quantities of coal with whom I have come in contact have been very much interested in the price and in bargaining as to the price of the coal.

(297) I believe that under the NIRA a sincere attempt was made to see that each one of the producers got a fair minimum price for his coal. The practical difficulties to any one accomplishing that are, I believe, almost insurmountable. The constant shifting economic conditions are so vast and changing that any rigid price structure that does not permit of some leeway becomes cumbersome and makes adjustments difficult. In my opinion, under the NRA code, provision for each particular mine of a price in respect of its particular coal which satisfied all concerned as being fairly proportioned to that of the other mines was not achieved. I do not believe as a practical matter such a result [fol. 302] can be achieved by the best intentioned people.

(300) It was my experience under the National Industrial Recovery Act that an attempt was made to classify coals as to various mines. The problem of classifying coals and the problem of pricing them is very much one and the same thing, since the price would apply to the particular class of coal. Under the NIRA difficulties were encountered in agreeing upon any suitable basis of classification, just as difficulties were encountered in agreeing upon a price that was agreeable to the many interests involved for any particular class of coal. Where a group of men undertake to classify and price coals, particularly if they undertake to classify and price coals of one of their competitors, errors of judgment may occur. Unconscious discrimination may result.

It is possible that deliberate injury could be caused. We are all of us human and our judgments are naturally swayed by self-interest. (301) Under the NIRA, prices were fixed per ton. For a company like Carter Coal Company sales of 25,000 tons and more would be regarded as large sales. They would vary from that amount to 200,000 or 300,000 tons. Carter Coal Company has contracts with different customers for varying amounts of coal, some for substantial tonnages. A change of a few cents per ton in the price would have a material effect on the customer's decision as to whether or not to buy from a particular mine when he is buying 50,000 or 100,000 tons, and would determine where the business would be placed, assuming that we are talking about two or more coals which would compete for the sale.

(302) In my judgment, based on my experience, if the [fol. 303] Corporation were negotiating for a contract covering 100,000 tons, the purchasing party would not await the period of time sufficient for the Corporation to have a hearing and appeals if it were dissatisfied with the price it must offer under the Bituminous Coal Conservation Act.

As long as prices are competitive for coals of the same general quality customers continue to deal with their regular suppliers of coal. They could not afford to do so however if prices were so varied as to penalize them for continuing to deal with the producers who have supplied them with coal in the past. (303) It is customary for large consumers to buy on long-term contracts. The coal business is seasonal.

Under the NRA code the coals of one of the mines of Carter Coal Company were so priced that it was not, as a practical matter, possible for the Corporation to market the coals in the normal volume. (304) That was the Caretta mine. Coals from the Caretta mine had been sold in substantial volume until prices upon those coals fixed by the NRA code brought about a substantial shrinkage in the volume that could be sold. Prior to the NRA, the prices received had for the Caretta coal compared favorably with the prices received at other mines, although the realization obtained from the Caretta over a period of time would be less than the realization from some of the other mines of the Corporation. There had been long-term contracts covering the sale [fol. 304] of Caretta coal and some of these expired during the period of the NRA. It was not found possible to renew them at the prices fixed under the NRA. (306) Since the

end of the NRA the Corporation has secured some of its former customers for Caretta coal who were lost during the NRA but not all of them. Many of the customers so lost by the Corporation had entered into contracts with other producers and until those contracts expire they will not be open to any tender from Carter Coal Company. The NRA prices for Carter Coal Company have not been retained.

About half of the Corporation's total production is fine or slack coal (of which Plaintiff's Exhibit No. 43 is a sample). The users of that coal are steel and by-product companies and large steam users. To find outlets for this substantial part of the Corporation's output is a difficulty confronting the Corporation. The sized coals are generally consumed by domestic users, individual householders, people operating hotels, apartment houses or other buildings. The larger sizes are generally marketed in rural areas and the smaller sizes in the cities. (307) This statement is general because there may be particular instances when a large market for the large sizes will exist in a city. (308) In speaking of prepared coal I exclude fine coal. Consumption of fine or slack coal by household users is negligible. This has an effect on the price which can be obtained for fine coals, which are sold at lower prices than are the prepared sizes. The fine [fol. 305] coals are more difficult to sell because the number of users is limited. The marketing of the prepared sizes is generally a more simple problem. It is generally true that the fine sizes of coal would be sold at less than the average cost of producing all the coal and the prepared sizes, being more desirable and more readily salable, will command a larger price. The ability of many mines to continue in existence has been predicated upon that very fact because by being able to sell a part of the coal at less than the cost of production (309) the mines have been able to retain as consumers of coal large users who would otherwise have been lost. Different mines have different proportions of fine coal. There are variations between different mines and between different fields as to the percentage of fine coal in the run-of-mine coal as it leaves the mine.

(315) I have had prepared under my direction two charts showing the week-by-week production record of the Carter Coal Company mines for the years 1933-1935. [The two charts were offered and received in evidence as Plaintiff's Exhibit No. 44.]

(316) Carter Coal Company has long-term contracts which are at prices below those in effect under the NRA coal code. It has contracts at prices below what the Corporation believes to be its cost of production. Those contracts relate particularly to fine coal which it is difficult to sell.

[fol. 306] (317) At times, Carter Coal Company sells its coal at prices which are very substantially higher than the average price over a period of years. It sometimes makes sales at prices which are very substantially above cost. At other times it makes sales at prices which are very substantially below the average price. (318) At other times it makes sales at prices which are very substantially below cost.

The Corporation has entered into long-term contracts since the enactment of the Bituminous Coal Conservation Act. These contracts run for more than thirty days. Some of these contracts are now in effect. These contracts in some cases provide a return of less than cost of production as estimated by the Corporation. (319) They relate principally to fine coal.

It is not the practice of Carter Coal Company to make available to the public its spot orders or copies of any of its contracts, invoices or credit memoranda. It is not the practice of the Corporation to make those available to any of its competitors, except that it did to a certain extent during the period when the NIRA code was in existence.

The establishment of hours and wages is an important problem confronting the management of Carter Coal Com-
[fol. 307] pany. It is one of the most important problems. More than 60% of the costs of Carter Coal Company at the mine are labor costs.

The Corporation has been in business since 1912 and during that period there have been no periods of long interruption of production at the Corporation's mines, except that at one time during the history of the Corporation for approximately a year one of its mines was closed and not in operation. (320) Exclusive of that period, shipments have been steadily made according to market demands.

Since the Carter Coal Company has been in business there have been two strikes at mines of the Corporation in West Virginia. One occurred in the early part of October, 1933, and the other occurred as a part of a nation-wide strike very recently, at the end of September, 1935. The

first strike was purely local. It lasted at two of the mines one week and at two of the other mines two days. The circumstances of the strike were these: Representatives of operators in the Appalachian region and representatives of the mine workers in that area had entered into an agreement pursuant to the provisions of the NIRA code. (321) No demands were made upon the Corporation by the men who did not work. No official explanation was given to the Corporation as to why they did not work but we were unofficially told it was as a protest of the action that had been taken by the representatives of the miners in signing the [fol. 308] agreement. The more recent strike lasted for about seven working days. It was a suspension of work at the conclusion of the recently entered into agreement between representatives of the miners and representatives of the operators.

The mine of Carter Coal Company which was closed for a period of about one year during the so-called depression period, when demands for coal were at a very low ebb, was Olga No. 1. The Corporation was at that time being managed by Consolidation Coal Company.

(322) [There were offered and received in evidence three exhibits, as follows: Plaintiff's Exhibit No. 45—Chart entitled "Trend of Wholesale Prices of All Commodities and Raw Materials Compared with Trend of Carter Coal Realization per Net Ton f. o. b. Mine"; (323) Plaintiff's Exhibit No. 46—Chart entitled "Trend of Wholesale Prices of Specified Commodities Compared with Trend of Carter Coal Realization per Net Ton f. o. b. Mine, 1926 to 1934"; and Plaintiff's Exhibit No. 47—Table entitled "Index Numbers of Wholesale Prices of Specified Commodities and of Carter Coal Realization per Net Ton f. o. b. Mine, 1926 to 1934".]

[There were offered and received in evidence four exhibits, as follows: (324) Plaintiff's Exhibit No. 48—Chart entitled "Average Hourly Wage Rates Paid Common Labor in Important Industries, separately for United States and for South Atlantic States, Compared with Wage Rate Per Hour for Common Labor Employed by Carter Coal [fol. 309] Company, 1926 to 1934, as of July 1 of each year"; (325) Plaintiff's Exhibit No. 49—Table entitled "Average Hourly Entrance Wage Rates for Adult Male

Common Labor, July of each Year, 1926 to 1934"; Plaintiff's Exhibit No. 50—Table entitled "Wage Rates Per Hour of Specified Types of Labor, Carter Coal Company, 1926 to 1935, as of July 1 of each Year"; Plaintiff's Exhibit No. 51—Chart entitled "Wage Rates Per Hour of Specified Types of Labor, Carter Coal Company, 1926 to 1935, as of July 1 of each Year".]

Cross examination.

By Mr. Critchlow:

[(326) It was stipulated that the distribution of the production of Carter Coal Company during the years 1927 to 1934, inclusive, was substantially the same as the distribution of the coal produced during those years throughout the area known as the West Virginia Smokeless Fields.]

[There was offered and received in evidence as Defendant's Exhibit No. 1 a table of distribution of West Virginia Smokeless Fields, 1927 to 1934.]

(328) There would be variations in the different years in the amount of coal that was sold by Carter Coal Company within the state in which produced. Those variations with respect to the total percentage of coal produced might be small but as to the percentage moving into the state in which produced might be substantial. Other than saying that the distribution of coal by the Corporation in the [fol. 310] period mentioned (1927-1934) was substantially that of the Smokeless fields, I would rather not say that it was a specified percentage. (329) I testified that substantially all of the coal sold moved out of the state in which it was produced.

Carter Coal Company maintains a sales organization for the purpose of selling the coal produced by it. The Corporation has offices outside the State of West Virginia where orders are solicited and taken for coal produced by the Corporation. (330) The Corporation has sales offices in Washington, D. C., New York, N. Y., Cleveland and Cincinnati, Ohio, Chicago, Illinois, Norfolk, Virginia, and Detroit, Michigan. A subsidiary has an office in Boston, Massachusetts. The Corporation has one or more representatives who are in an agency capacity in certain areas.

The Corporation mines coal through its operating department. The coal is put into cars at the mines. (331)

That coal is sold by the sales department of the Corporation, operating through salesmen, some of whom are in offices and others of whom move about the country soliciting orders for the coal. Some of the coal is sold as what we term in the trade "spot", that is, for delivery within a comparatively short time. Other sales are made for delivery over a period of a considerable number of months. It frequently occurs that coal is produced and loaded into railroad cars before the order for the sale of the particular coal may be obtained. Generally, however, the substantial part of the tonnage produced from a mine will be that to [fol. 311] be applied upon contracts calling for the delivery of coal over a period of months.

Substantially all the coal sold by Carter Coal Company is upon an f. o. b. mine basis, by which I mean that the coal is delivered to the purchaser free on board the cars at the mines. The purchaser, having acquired title to the coal, pays the transportation charges to whatever destination he may take his product. (332) The subsidiary operating in Boston is a corporation the capital stock of which is owned by Carter Coal Company. Carter Coal Company sells coal to the subsidiary which in turn markets that coal or coal that it may purchase from any other producer in the markets it can reach.

A statement furnished to the Government defendants by Carter Coal Company with respect to its production and realization by states, 1923 to 1934, purports to show the production in net tons of Carter Coal Company for the years indicated thereon, the mine realization and also the operating expenses, (333) insurance, taxes, etc., including mine depreciation and depletion, as provided on the books of the Corporation. The statement also shows the average mine realization per ton in dollars and cents. In so far as I know the figures on the statement are as shown by the books of the Corporation. I myself have not examined all the entries on the books of the Corporation but the statement is accurate so far as I know. [The statement was marked Defendants' Exhibit No. 2 for Identification.]

[fol. 312] (334) In the statement in the column containing the figures for the year 1934 the mine realization price for that year is given as $3,918,266. The figure there given, as the note on the bottom of the exhibit explains, is the realization received by the Corporation from the coal sold

by it. There is an adjustment for inventory that takes place at the end of each year in the management of the Corporation which is included in that figure. The operating expenses given in line D for that year are $3,334,446. (335) In my bill of complaint I allege that for the year 1934 Carter Coal Company made a net profit of $323,998, which figure is correct as shown by the books of the Corporation. The items that were deducted from the figure of approximately $527,000 (the difference between mine realization and operating expenses in 1934) in arriving at the net profit figure of $323,000 were the expenses of administering the affairs of the Corporation, the expenses incident to the marketing of the coal, and interest charges, in general. There were added to that any other income that the Corporation might have derived from other sources. The figure given in line D does not include selling expense or general administration or items of that sort—Capital charges. (336) Carter Coal Company's method of accounting, which is not unusual in the coal industry, is to divide the total cost of the Corporation generally into three divisions, namely, cost of producing coal, cost of selling coal, and general and administra- [fol. 313] tive expense. The figure given on the statement is the cost of producing coal.

[The plaintiff then offered in evidence the statement theretofore marked Defendants' Exhibit No. 2 for Identification and it was received in evidence and marked Plaintiff's Exhibit No. 52.]

The mine-realization figure for the year 1933 was $1,750,480 and the operating-expense item for that year was $1,964,549, which figures are correct. (340) Carter Coal Company was under the control and management of Consolidation Coal Company during the period from February, 1922 to March 15, 1933. (341) I was not employed in any capacity nor did I have anything to do with the Carter Coal Company during that time. During those years I made myself generally useful in such ventures as my father might be involved in. Prior to that time I was engaged actively as manager of or as an employee of Carter Coal Company. I was so employed from about 1915 to 1922 with the exception of a period of time when I was in the Army.

I believe that the profits of the industry as a whole during the period of regulation under the NRA bituminous coal

code were greater than they had been for a number of years and that, measured by profits, the industry was benefitted. I believe, however, that those benefits brought certain injuries and perhaps delayed the solution of some of the problems that may confront the industry. For example, that [fol. 314] period lifted prices to a point high enough to invite the opening of mines which had been closed and perhaps the opening in some instances of mines that had not operated before. (342) I have many times stated that I would prefer temporary regulation of industry under an emergency statute, under a code to be changed from the one that was in effect, over having fixed regulation of the industry by Congress. I testified before the Senate Committee when it was holding hearings on the present Act that:

"Those of us in the coal industry may differ as to the protection of the code. I believe that there is substantial agreement in the industry that the code has been of benefit to the coal industry, and that part which you played (addressing Senator Davis) and to which you have just referred in connection with the N. I. R. A. has been fruitful of results in the bituminous-coal industry."

That was in connection with an exchange between the Senator and me in which the Senator was seeking to imply that his interest in furthering the enactment of the NIRA had had in mind the coal industry and that I might be an ungrateful recipient of the favors that had accrued to me as a member of the industry. (343) I was trying to disabuse the Senator's mind and to assure him of the opinion expressed by me there. I also testified that I favored a continuation of the bituminous coal code under the then existing NIRA. I did so as the lesser of two evils. That was the thought I had in mind when I testified. I believe that was the thought that I expressed to the subcommittee of the Senate during that hearing at some time during the proceedings.

[fol. 315] (It was stipulated that the testimony quoted was given on February 27, 1935.)

I also testified before the subcommittee on Ways and Means of the House. I testified as is stated on page 315 of the printed report of those hearings as follows:

"Mr. Vinson: What is your attitude toward a 2-year extension of N. R. A.?

"Mr. Carter: I took no part actively in the N. R. A. legislation. I was in sympathy, in common with a great many other operators, with an extension of the N. R. A. Act.

"Mr. Vinson: Did it benefit you?

"Mr. Carter: It did.

"Mr. Vinson: You did not hesitate to take its benefits?

"Mr. Carter: I welcomed them."

(345) I believe that fair and equitable wages should be established and I believe that, representing, as wages do, more than 60% of the cost of producing coal, such establishment would exercise a stabilizing influence on the industry.

I testified before the subcommittee of the Committee on Interstate Commerce of the United States Senate as follows:

"Mr. Carter: Senator, I do not believe that without the minimum wage and maximum hour provision, any degree of stability could have been achieved in the coal industry. I believe that is the base upon which the coal industry must rely to solve its problems, some base, fixed base of wages and hours, keeping in mind of course that there are equitable differentials and changes in districts that must be preserved in order to prevent a dislocation of the industry and that [fol. 316] would injure the operators and all the men concerned."

That was my opinion and it is now.

(346) I also testified as follows:

"So far as labor is concerned I am sure there is a unanimity of feeling that the men and women employed by and dependent upon the industry should not be subjected to a lowering of their standards of living because of unrestrained play of economic forces. It seems obvious and unanswerable that some provision must be made for the protection of these workers, and it would seem that the best sort of protection which could be afforded them would be the maintenance, by statute, of maximum hours of labor and minimum rates of pay."

That was my feeling and it is still my feeling, but at that time I did not know that the Congress of the United States did not have the power to do that.

Carter Coal Company and the men belonging to the United Mine Workers of America, the representatives of those men, recently entered into negotiations, which were successfully concluded. A contract was prepared and the men are operating under that contract. (347) The contract as I recall was negotiated by the Smokeless Board, although as to the exact title I may have it incorrectly stated, but that organization at any rate is representative of the Carter Coal Company as well as all the other producers in that district. The relationship between Carter Coal Company and the mine workers is governed by that contract. That contract was satisfactory to Carter Coal Company and it was to the other companies that accepted it. The contract is to run until April, 1937, as I recall. That contract fixes maximum hours [fol. 317] of labor and it also covers a scale of wages. It also provides that the mine employees shall be entitled to have their own checkweighmen and that they should not be required to live in company houses or trade at company stores. (348) That contract was negotiated by representatives of employees through collective bargaining. I do not know whether the provisions of that contract in so far as they have to do with maximum hours of labor were executed by more than two-thirds of the producers, by tonnage, throughout the United States. I do not know the percentages of miners or the number of operators involved. I only know that that agreement was sufficiently satisfactory to Carter Coal Company and to other companies in the district in which our mines are located, to be acceptable. I could not testify of my own knowledge as to whether or not that contract was executed on behalf of more than two-thirds by tonnage of the producers in my district. But I would hazard the assumption and say that to the best of my knowledge and belief the contract is applicable to substantially all of the coal companies in the districts in which it is operative. (349) I believe that in the area in which our mines are located all of the coal companies have the same kind of contract relationship with their employees that our company has. Shortly after or simultaneously with the promulgation of the NRA code an agreement was entered into between representatives of the United Mine Workers of America, representing our employees and various operators with [fol. 318] respect to the hours and wages set out in the code and the other conditions of employment agreed upon by the parties.

The NIRA code for the bituminous coal industry set up certain geographical divisions in the coal industry. (350) One of these divisions was known as Division No. 1 which embraced a substantial part of the tonnage produced in the United States. In Division No. 1 there were many coal mines producing different varieties of coal, which varieties are sized into different sizes. Those various sizes and varieties are marketed in different markets in what was termed during that period market areas or price areas. Compilations were prepared from time to time by certain organizations set up under the code tabulating those prices. I have seen such a tabulation. I did not myself count them but I have been told that one such tabulation covering the coals included in Division No. 1 included about 27,000 different items. I hazard a guess that if there were added to that the additional mines which have been included in price area No. 1 of the Code under the present Act, there would probably be as many as 40,000 in that one price area. I do not mean that there are 27,000 different sizes of coal or that run-of-mine coal is divided into 27,000 different sizes. (351) I tried to make clear this morning that in the case of Carter Coal Company the run-of-mine coal is usually screened into the sizes of coal that I showed to the Court. (Plaintiff's Exhibits Nos. 36-43.) The NIRA code did not attempt to classify as regards Carter Coal Company any more sizes than we produced. Of course, the NIRA classified many [fol. 319] different sizes and varieties of coal that the Carter Coal Company does not mine or produce.

(353) Carter Coal Company produces about 10,000 tons of coal a day. In keeping alive and in operation such a business there are a great many transactions taking place each day. There are a great many different sales made. The Corporation has made a number of sales and has made various contracts. I hope that it will not be necessary for me to put into the record here to make public each of those transactions. One of the reasons why I do not want the Corporation to become a member of the Code is that it will be obligated to disclose such information to its competitors. Many of those competitors are in this room. Many of the men who are heads of companies with which I am in daily competition are here. Many of the men are here who would be competing with me for these various pieces of business. So, if it is not necessary that I disclose each particular trans-

action I shall be glad. I shall be very glad to testify as to the general facts.

(355) By the Court:

When I speak of selling for less than cost I am not considering each ton of coal, but the average. That is the usual [fol. 320] practice in the industry. We refer to the cost of coal as being the average cost per ton. Of getting it all out. We have to sell some of the cheaper grades of coal at less than the average cost and other grades of coal at more. If some were not sold at above cost it would be only a matter of time until we would have to go out of business.

By Mr. Critchlow:

I could not tell you from my recollection what the average mine realization price *price* of the coal produced by Carter Coal Company has been by months since January 1, 1935. I could have that information compiled and also the operating cost by months during the same period. (357) I could have it compiled so as to include operating cost and selling price or expense items.

[fol. 321] PAUL H. JOHANSEN, another witness called on behalf of the plaintiff, being first duly sworn, testified and stated as follows:

Direct examination.

By Mr. Whitney:

(359) I am at 713 Mills Building, Washington, D. C. I am an auditor of freight accounts. I have been in that business for the past ten years. From 1925 to 1929 I was in business by myself in North Carolina. From 1929 to 1933 I was with the Interstate Traffic Company in the Mills Building. For the past two years, with the exception of a period of about ten months, I have been in business for myself. I have appeared as an expert witness as to freight rates before the Interstate Commerce Commission on numerous occasions. (360) I have had considerable experience in the manner in which the carriers prepare their rates for publication.

I have obtained a map from the Chairman of the Central Freight Association, Coal and Coke Committee, on which I have made some coloring. The districts indicated in red are the southern grouping, District No. 7, and the Carter Coal Company's mines are located in the Tug River group, in the lower part of the map. I have prepared four exhibits. First, a statement of "Freight rates from various coal-producing fields to Illinois, Indiana, Michigan points"; second, a statement entitled "Freight rates from various coal-producing fields to Ohio points; third, statement entitled [fol. 322] "Freight rates from various coal-producing fields to Lake Cargo points" and fourth, statement entitled "Comparison between coal fields and districts under code."

(361) Lake Cargo points are points on Lake Erie to which coal is shipped from various producing fields for trans-shipment by water to points in the United States and Canada. Cleveland is such a point. Taking Cleveland as an example, it is a fact that the rail freight rate to Cleveland for coal destined to points beyond Cleveland to be carried on the Lakes thereafter is less than the rail freight rate to Cleveland for coal designed for that point and not going beyond Cleveland. The term "lake cargo coal" denotes coal that is to be carried beyond Cleveland or beyond whatever port is concerned. There are points other than those contained in the statements that have differing rates in those same consuming markets. I have picked only the points that have a population of 25,000 people or over to which coal has been shipped or is now being shipped. The other rates are related to the rates included in the statements in such a fashion that in my opinion as a traffic expert these give generally a fair view of freight rates for coal from the districts in question to the consuming areas in question.

(362) I prepared the statement entitled "Comparison between coal fields and districts under code" to correlate the freight classification of districts with the Coal Conservation Act classification of districts. This tabulation shows [fol. 323] the coal-producing fields in alphabetical order and to the right is shown the districts under which they fall under the Bituminous Coal Code.

(363) The figures on the statements represent dollars and cents. They are on bituminous coal in carloads. They are the current rates and the emergency surcharges allowed by the Commission have not been added to them. These sur-

charges are in under emergency and the emergency period will expire on June 30, 1936. They changed the ratio between the various charges and they are by way of flat additions dependent upon the level of the rate itself, so that they are flat additions but in effect they are rough percentage additions.

(364) [Exhibits were then offered and received in evidence as follows: Plaintiff's Exhibit No. 53—Map; Plaintieff's Exhibit No. 54—Statement entitled "Freight rates from various coal-producing fields to Illinois, Indiana, Michigan points"; Plaintiff's Exhibit No. 55—Statement entitled "Freight rates from various coal-producing fields to Ohio points"; Plaintiff's Exhibit No. 56—Statement entitled "Freight rates from various coal-producing fields to Lake Cargo points"; Plaintiff's Exhibit No. 57—Statement entitled "Comparison between coal fields and districts under code."]

[fol. 324] (371) FREDERICK G. TRYON, witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr Critchlow:

I work in the economics branch of the United States Bureau of Mines, and am called Principal Economist, assigned to duty in the Coal Division of that branch. I have been a student of the coal industry since 1917. My training is that of a mineral economist with supplementary studies of economical geology. My training was acquired at the University of Minnesota and at the Johns Hopkins University. I studied geology merely to get a background for the pursuit of inquiries into mineral economics, and to gain some knowledge of reserve conditions. I followed geology long enough to earn a very poor living as an oil company geologist, and to pass the assistant geologist examination of the United States Geological Survey, and to be appointed. (372) I was immediately assigned to work in the economic and statistical inquiry branches, and have been so engaged ever since. I have done no work of a technical character for the United States Government, either as a geologist

or as an engineer, although I have been in contact with technical men. In the narrow field of economic and statistical approach I have had unusual opportunity to study the coal industry of the United States, and of the world. I was assigned as junior assistant to the Committee on Coal Pro- [fol. 325] duction of the Council of National Defense in 1917. Likewise, I was detailed to assist the statistician of the Geological Survey in charge of coal and coke, he later becoming Director of the Division of Statistics of the United States Fuel Administration. I was drawn into the army and posted at the War Department with instructions to watch fuel as a limiting factor in the conduct of the war, and was in frequent contact with the United States Fuel Administration at that time, learning much of its problems without in any sense being responsible for its success. I was sent overseas to General Headquarters, for a time, and then was detailed to the economic section of the American Peace Commission at Paris, and put to work studying the coal industry of the central powers with reference to the reparations section of the Treaty of Versailles.

(373) I was for a time secretary of the American Section of the Raw Materials Division of the Supreme Economic Council. Returning to the United States, I was appointed in the Statistical Unit of the United States Geological Survey, dealing with coal and coke, and shortly thereafter placed in charge of that unit, and have been associated with that work since, including the period since 1925 when it was transferred to the United States Bureau of Mines. During that time I have been on leave of absence a number of times. I was sent abroad as a delegate to the World Power Conference at London in 1924, and had occasion to spend some months studying the coal industry of [fol. 326] England, on the ground. I have also had opportunities to study the coal industry in Nova Scotia, Australia, and to go underground in all these countries. I was on leave of absence at the Brookings Institution on one or two tours of duty and took part in the preparation of their study on "America's Capacity to Produce," writing the mining section of that report. I was detailed for some months to the President's Committee on Recent Social Trends, and wrote the mining chapters of that report. I was attached to the President's Committee on Fuel Coal Distribution, set up by President Harding, during the 1922

strike of miners and took some part in the efforts to control distribution of coal at that time. I was statistical adviser to the United States Coal Commission of 1922-23, and edited its report. I have had occasion to write a large number of reports on the statistical economic trend of the coal industry for the United States Bureau of Mines and the Geological Survey. (374) I wrote and edited the volume called "What The Coal Commission Found", and another volume on "Mineral Economics" published by the Brookings Institution. I believe I have lectured on mineral economics at the University of Pennsylvania graduate school and the Robert Brookings graduate school. My approach has been throughout from the standpoint of a statistician and economist. I think I may fairly say that I have tried to make it an impartial approach. I do not own any coal company securities and have declined any offers of employment by coal companies or coal associations. I did not [fol. 327] happen to be connected with the National Recovery Administration and I have no connection with the present National Bituminous Coal Commission.

The Bureau of Mines has primary responsibilities in the field of accident prevention, promotion of health of miners, and in technological studies, in the attempt to reduce mine accidents and improve mine technology. Those I know nothing about. It likewise has an economics branch, which collects and publishes primary statistics of the supply and demand of mineral commodities. I work in the Coal Economics Division of that branch. Its function is to try to watch the flow of coal, the production, the consumption, the stocks, distribution, price movements. I do that currently on a scale sufficiently detailed, and at a rate sufficiently rapid to be of some service to buyers and sellers. (375) The unit also watches long-time trends of the industry in so far as they are recorded in the production, the operation of mines, and the mechanical equipment of mines; also, the volume of employment and working time. The entire work of the Bureau, of this branch of it in particular, is based on voluntary cooperation, and we cannot wisely or effectively go into controversial points, such as costs of production, investments, profits or wage rates. The data I have been asked to prepare and present on this occasion that deal with the subjects of costs, investments or wage

rates, are therefore necessarily drawn from other sources, but which I believe to be reliable.

It is the fundamental policy of the Bureau of Mines to [fol. 328] confine its work to scientific investigation and to fact-finding inquiries. This policy is inconsistent with expressing opinions. I have been instructed as a representative of the Bureau to prepare and submit in evidence the statistical portions of certain statements. I hope very much that the examination will not lead me beyond the facts of the statistical records or such other facts as are directly drawn from my experience and are clearly established. If I am called upon for any opinions or expressions of judgment it must be clearly understood that they represent my personal views only, and that they do not represent the position of the Bureau of Mines nor of any other members of the staff. I have not discussed the issues raised by this case with any other officials of the Bureau, and I do not know what their views may be.

(376) I should like to ask one consideration based on the strength of 17 years of government service, and that is that counsel will bear in mind that my usefulness to the industry depends on preserving an impartial and detached position and to confining the investigation so far as possible to what can be proved, recognizing the fact that the more I am drawn into expressing opinions on controversial matters the less useful my service in this primary capacity will be.

I have had prepared under my supervision certain charts and statements. [These were offered and received in evidence as follows: (379) Defendants' Exhibit No. 3—Chart [fol. 329] entitled "Bituminous coal production, realization, and mine capacity in the United States, 1899-1934"; Defendants' Exhibit No. 3-A—Statement entitled "Bituminous coal production, realization, and mine capacity in the United States, 1899-1934"; Defendants' Exhibit No. 4—Chart entitled "Trends of employment, working time, wage rates, and labor productivity, 1899-1934"; Defendants' Exhibit No. 4-A—Statement entitled "Trends of employment, working time, wage rates, and labor productivity, 1899-1934"; Defendants' Exhibit No. 5—Chart entitled "Average spot prices of bituminous coal, 1913-1931, by months"; (380) Defendants' Exhibit 5-A—Statement entitled "Average spot prices of bituminous coal, 1913-1931, by months"; Defendants' Exhibit No. 6—Chart entitled "Net income or

deficit of the bituminous coal industry, prior to deductions for tax, for specified years, 1917-1934"; Defendants' Exhibit No. 6-A—Statement entitled "Net income or deficit of the bituminous coal industry, prior to deductions for tax, for specified years, 1917-1934, according to Treasury Department data."]

The reason that bituminous coal is important is simple. American economic life has become completely dependent on energy, and bituminous coal is the principal source of energy. National consumption of energy has grown by leaps and bounds so that during the last 25 years we have consumed more fuel and more power than in all the previous history of the country, back to the days of earliest colonization. [fol. 330] (381) There is no need to enumerate the ways in which heat and power have woven themselves into American economic life. Industrial uses and heat are quite as important as the keeping of buildings warm; and as for power, it has had an immense development. The dentist uses it in his little drill, and the street laborer uses it in his pneumatic punch. Nowhere in the world is this dependence on power and heat as great as it is in the United States. According to studies by Professor T. T. Read of Columbia University, more than 97% of the total output of work in the United States is now derived from mechanical power, and human power makes up less than 3%. The per capita use of mechanical power is far greater in the United States than in any other country. It is 1.6 times as great as in England, 2½ times as great as in Germany. (382) It is 11 times as great as Japan and 150 times as great as in a country like China. American life is becoming absolutely dependent upon a continuous flow of energy. Without it we would not only freeze but starve.

All but a small part of this flow of energy comes from fuel, and the largest part from bituminous coal. Electricity is merely a convenient way of applying energy. It is not the primary source of energy. The electric generator has to be driven either by fuel or falling water. Last year, 1934, our computations of the source of the total energy supply of the United States gave the following results: Water power supplied 9.3% of the national energy supply. [fol. 331] Natural gas supplied 8.7%, and oil, including that part which is used in driving automobiles and which included imported oil, supplied 28%. Coal of all kinds sup-

plied 54%. Of that 54%, 7.7% came from anthracite and 46.3% came from bituminous coal. Bituminous coal is, therefore, the largest single source of the energy budget of the United States.

(383) The share contributed by coal to the total energy supply has been declining, and the share of oil and natural gas and water power has been increasing, as everyone knows. While some of this increase in supply of oil is a direct displacement of coal, the important bulk of it goes into motor fuel to drive automobiles, where coal is hardly supposed to compete, or in other uses where coal can hardly compete. If one considers the familiar uses of coal in the generation of steam and heat, he finds that coal still dominates. Our computations indicate that in 1929 bituminous coal supplied 75% of all the primary energy used in manufacturing industries. That does not include purchased electricity produced, of course, in central electric stations. Bituminous coal supplied in 1934, 76% of all the fuel used by the public utilities, that is, the steam electric plants producing power for public use. Bituminous coal supplied, in 1933, 83.6% of all the energy used by the railroads for locomotive power.

[fol. 332] (384) The potentialities of water power are limited. Mr. Charles P. Steinmetz calculated, before his death, that if every rain drop falling on the United States should be transformed into power it would not supply the amount of energy already derived from coal. (388) In my own opinion, water power can never furnish more than a minor fraction of the energy requirements of the United States. The supplies of oil and gas are also clearly limited. It is probable that for the next few years there will be further increases in the use of liquid fuel, but geologists are generally agreed that present supplies cannot be maintained for more than a few decades.

(390) By the Court:

By "present supplies" I mean present rates of production. An inventory by the United States Geological Survey estimates the reserves at the end of 1933 of recoverable oil in known fields of the United States at 13,360,000,000 [fol. 333] barrels. If those were drawn on steadily at the 1933 rate of production, it would last not quite 15 years assuming, that is, that no new fields were discovered (391)

and that it were possible to recover all the oil in that time. Practically, it would be impossible to produce the full amount of these estimated reserves in even 25 years, because, as a field gets older, the amount of oil which can be taken out in the course of a year declines, and it is well recognized that new fields will be discovered and that improvements in the technology will increase recoveries beyond limits now practical, but the prospects of further discovery do not obscure the facts, as the Geological Survey reports, quoting:

"Petroleum reserves are irreplaceable, and each year's production brings the nation nearer to an inadequate supply and ultimate exhaustion."

That is quoted from "Geology and Occurrence of Petroleum in the United States" by the United States Geological Survey, printed in hearings before a subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Congress (Recess), on House Resolution 441, pp. 1080 to 1081.

Geologists Arnold and Kemnitzer, who are petroleum geologists of outstanding reputation, reviewing the natural resources, made the following estimate, on January 1, 1929. This was before the East Texas Field was discovered but they made allowance for future discoveries as they best anticipated they would be made. (392) Quoting from Arnold and Kemnitzer:

[fol. 334] "Petroleum in the United States and Possessions, 1931"

at pp. 51 and 52:

"The resources of natural crude oil in the United States are estimated to have been, on January 1, 1929, a little more than 50% developed, but less than 30% exhausted. At the rate wells were then being drilled, average full development would be reached in 30 years, at the end of which time would begin a long period of post-development production lasting 113 years, to practical exhaustion."

It is a reasonable interpretation of Arnold and Kemnitzer's position that they attach no exact value to these figures of the number of years that the supply would last.

The point that is important to bear in mind is that the supply is limited, that these geologists in particular, and the United States Geological Survey, hold that the total production will necessarily decline after a few decades. As petroleum diminishes in supply, or increases in cost, the burden of meeting the national requirements for energy will naturally be transferred more and more to coal. Methods are already in commercial use in Europe for the conversion of coal into motor fuel, and at much higher prices than prevail in the United States, but there is no question that if and when a shortage of petroleum forces a great advance in the price of crude oil and refined products in the United States, the necessary motor fuel and lubricant can be made from bituminous coal. (393) This will throw, before many decades, a greatly increased burden upon our coal supplies.

By Mr. Whitney:

[fol. 335] The increased demand will fall upon bituminous coal. The reserves of Pennsylvania anthracite are already 29% exhausted, and there is no prospect that anthracite production can increase materially over the past maximum attained during the war years. The soft coal mines, therefore, must continue to be our chief source of the flow of energy that is necessary to American industrial life.

By Mr. Critchlow:

Technical efficiency, in so far as can be measured in terms of statistical performance, is high in the bituminous coal industry of the United States, if not the highest in the world. The resources of bituminous coal are abundant and they are favorable to low-cost mining. I have made measurements of the average thickness of bed, the average dip of the seam, the depth of coverage, and other physical factors in the mines of the United States as compared with those of foreign countries, particularly of Great Britain. I imagine there would be no dispute among practical coal men that mining conditions are exceptionally favorable in this country. (394) The beds are relatively thick. They lie close to the surface in many places. They outcrop on almost every hillside, in portions of the Appalachian Field. They are exceptionally free, in com-

parison with European conditions, from faults or from igneous dikes, such as occur in parts of Great Britain. They are flat-lying. The roofs, on the whole, are favor-
[fol. 336] able to the application of machinery. On almost all physical factors, the natural conditions in coal deposits in the United States are among the most favorable in the world.

As further proof of the technical efficiency of the United States, from statistical sources we have computed the average output per man per day underground in the American bituminous mines and in those of Europe and of other countries. The output per man per day here is about three times that of Germany and nearly four times that of England. It is six times that of Belgium or Japan. The data, in terms of metric tons per man per day, are: For the United States bituminous mines, 4.9 tons per man; for Great Britain, 1.3 tons per man per day; for the Ruhr District of Germany, 1.6 tons per man per day; for France, 1.0 tons per man per day; for Belgium, 0.8. Furthermore, the efficiency of the American industry has been increasing. (395) The test of efficiency is the growth of the average output per man per day over a period of years. In 1890, according to the records of the Geological Survey, and of the Bureau of Mines, the tonnage per worker was 2.56 tons, and in 1932 this had increased to 5.22 tons. In other words, the output per man per day has more than doubled in the period since 1890, and the advance has been especially rapid in the last few years. The record is shown in the lower curve on the chart (Exhibit 4) in which the base line, for purposes of statistical convenience, represents two tons per man per day, and this line (indi-
[fol. 337] cating) represents four tons. The chart begins in 1899 and extends to 1934. This is the record of the gradual increase in the output per worker. The apparent decline in 1933 is partly a statistical fraction, and partly due to some shortening of hours and diminishing of overtime, as an effect of the NRA program. These figures are in terms of net tons per man per day, whereas the ones I cited in making the comparison with foreign countries were in metric tons per man, underground. (396) I do not see any physical obstacle in either the natural resources or the present physical and mechanical equipment of the mines, or any lack of managerial or engineering skill. As

far as those factors are concerned, I see no reason why this industry cannot be among the most prosperous of American businesses, yielding generous wages to employees and reasonable profits and reasonable rewards to management. The difficulties lie in the economic organization of this industry and of the competing industries producing other fuels.

Any evidence that I might give regarding economic conditions in the industry before the war is necessarily based on materials accumulated by the Geological Survey or the Bureau of Mines before I began serving with them, or on other documentary evidence from trustworthy sources, or on what I have been able to learn by experience and by conversation with men who lived through those days. My interpretation of the evidence that is at hand would be [fol. 338] that the present difficulties of the bituminous coal mining industry are not wholly new; that as far back as the statistical record can be pushed, there was a marked surplus of the mine capacity. This surplus of capacity came about from many causes. The resources were widespread. They had passed into the ownership of hundreds of thousands of farmers, and their farms, in turn, had been sold to a large number of land-holding companies. The owners desired to realize on their investment in the only way they could put it to use and that tended to open more mines than were needed. (397) The pressure of taxes and carrying charges on these land-holdings led to opening still more mines. Once the mines opened, the pressure of overhead, the tax burden and other factors drove the operator to produce all that he could possibly sell. Shifts in market demand occurred, throwing tonnage from one district to another. The change from beehive to by-product coking caused a transfer of a heavy load of business from some of the northern fields formerly producing beehive coke to the southern fields, in a position to supply coal for by-product coke in markets where by-product ovens were established. The expansion of the railroad net alone led to the opening of many new fields, and consequently of new mines. The freight rate and wage rate structures were, on the whole, so adjusted as to encourage development of the outlying districts. Finally, large-scale suspensions in the organized fields tended to cause consumers of coal, during the period of the suspen-

[fol. 339] sions, to seek sources of supply elsewhere, and were a factor in the development of additional capacity. All of these factors combined create the surplus of mine capacity.

The statistical record of capacity is shown on the chart (Exhibit No. 3). At the top of the chart is given the full-time capacity at 308 working days a year. (398) Below it is shown also the capacity assuming 280 days, a more conservative figure which was suggested some years ago by the coal department of the American Institute of Mining and Metallurgical Engineers. Both these records of capacity are calculated from the reports supplied by mine operators to the Bureau of Mines or in the earlier years, the Geological Survey. They show what the mines could produce if they worked a specified number of full-time days (308 days) with the same equipment and at the same rate of production that they actually obtained on the days that they were operating and the same labor force. In the calculation of the national total capacity, each mine is weighted in accordance with its tonnage and its importance. Turning to the figure of full-time capacity at 308 days, it is important to bear in mind that coal mines actually do try to operate 308 days a year, or they did before the coming of the NRA code. There is possibly some limitation as a result of the code.

The daily car loading records, kept over many years, show that in the typical districts, coal would be leaving the mines —some mines at least—on every one of 308 calendar days in [fol. 340] the working year. In some districts the working year is a bit longer, and in other districts a bit shorter than 308 days, on account of variations in observance of holidays, but the national average is very close to 308 days. There are quite a number of mines that succeed in operating 308 days a year. Many of them are captive mines. There are numerous instances where a mine has produced 308 days without a breakdown or without loss of time. (399) It is clear that all mines cannot manage to avoid mechanical breakdowns during the course of the year, and that some allowance has to be made for the possibility of falls of roof, accidents, failure of power supply, or some other mechanical difficulty that will shut down the mines. To test this point, I have made a study of the operating performance of 2,000 mines over a period of five years,

and it shows that on the average the typical mine will lose about nine days out of the year through failures of a mechanical character of one kind or another. 308 days less nine days is 299 days. On 299 days of the year the mines were there in this period, physically able to produce, and seeking a market. Even in the pre-war days, the soft coal mines of the country never approached 299 days a year. The actual average for the years 1890 down to 1914 was 213 days a year, so that out of this physically available 299 days they lost, on an average, 86 days. Of this 86 days average, an idleness of 34 days has to be set down as more or less unavoidable on account of the seasonal [fol. 341] character of demand. Consumers require more coal in winter than they do in summer. In the middle west the January peak may be twice as high as the off season trough. Obviously, until consumers change their buying habits, the industry has to maintain a capacity sufficient to take care of this peak. Over the country as a whole our studies indicate that the seasonal pattern of demand involves an average loss of 34 days a year (400) which cannot be avoided unless consumers are induced to change their buying habits. This fact does not make the loss of time any less serious to the worker or to the owner of the mine. The miner has to feed himself on the 34 days when the consumer is out of the market, and the operator has to continue to pay fixed charges and overhead. The operator is therefore under continuous pressure to try to sell that coal on the days when the market is dull, and the surplus continues to hang over the market. That is why coal prices usually fall off during the summer months.

The fact that the bituminous coal industry has to maintain a productive capacity sufficient to take care of the seasonal peak, is one of the great causes of the intense competition in the industry. In the pre-war days the industry never approached even the limitations that would be permitted by the seasonal pattern capacity. From the 299 days potential working time that is physically available if 34 days for seasonal loss is subtracted there remain 265 days in the year when, if capacity were balanced nicely and accurately with demand, the mines would be [fol. 342] able to work, but they have never succeeded in attaining to 265 days.

(401) During the pre-war days, in addition to the seasonal idleness, there was an average loss of 52 days a year, which has to be set down to simple excess of capacity. Some of this might be taken out in a car shortage or a labor dispute, but even if there had been no artificial interruption, the mines would have continued to be idle through lack of demand. The capacity was developed even then, not only beyond average requirements, but beyond peak seasonal requirements. As the chart shows, capacity continued to grow throughout the pre-war period. It grew slightly faster than demand. The total capacity, on full-time basis, has increased from 152,000,000 tons in 1890 to 279,000,000 tons in 1900 and 668,000,000 tons in 1914. The trend, in average working time, is shown in the lower portion of Defendants' Exhibit No. 4.

(407) The surplus of capacity which existed in pre-war days, had the effect of forcing intense competition among coal operators. It was relieved only occasionally by car shortage or a strike. Competition made it difficult for operators to maintain reasonable labor standards. There can be no doubt about the difficulty experienced by employers in maintaining such standards as then existed. During this period it was possible to get jobs in the mines and the rates of wages were sufficient to cause men to enter [fol. 343] employment because, as indicated by the chart (Defendants' Exhibit No. 4) the number of workers increased. (408) There was a rapid increase in the number of men working in the mines, but the employment was intermittent and the average man between 1890 and 1914 was offered about 217 days during the year. Accident rates in the mines were high, as they still are.

(409) The trend of the daily wage rates in the years before the war is indicated in Defendants' Exhibit No. 4. I have selected for plotting in this chart, and recorded in the exhibit, the union day wage scale for inside labor, the occupation of trackman, which is one of the skilled occupations, in the State of Illinois. In the year 1900 the day wage rate was $2.28 and it increased slightly with one recession from 1904 to 1906 to $2.85 a day before the World War. In the year 1913 the rate in effect for inside skilled labor was $2.85 in Illinois. The mines of that state operated 189 days in that year. A rough indication of the

earnings of an average day man can be obtained by multiplying the daily rate by the average number of days worked by the mines. The answer is $540 for the year's work, and that in a year when business in the coal industry on the whole was quite as good as normal. (410) The increase in the day wage rate from 1900 to 1914 amounted to 57¢.

There were strikes of labor or labor disputes as indicated by the statistical record maintained by the Geological Survey in the pre-war period. The basis of that record [fol. 344] was obtained from the answers to questions in operators' annual reports and the replies were obviously ex parte statements. An operator might report as a strike a labor dispute that was really a lockout. In later years I have followed the practice of indicating that these records represent losses of time on account of all labor disputes, including strikes, lockouts and suspensions. "Suspension" is the term used in the industry for a stoppage of work at the expiration of a wage contract between employers and employees when the two parties are unable to agree on the terms of renewal. During these pre-war years labor relations in the industry were unstable, as is indicated by the statistical record. Aside from petty strikes involving a single mine there were a number of major suspensions which shut down several fields in several states at one time and there were a number of strikes in districts arising over the attempt of the union to organize the non-union fields. (411) With reference to suspensions, the employers and the employees in the organized districts had adopted a system of two-year wage contracts which expired in the even years. It proved very difficult to negotiate the renewal of these contracts, largely because of the competitive pressure of one field against another field and particularly because of the competition of the non-union districts against the union districts. The lower chart in Defendants' Exhibit No. 4 shows in the black segment the amount of the working year for the country as a whole which was idle [fol. 345] on account of strikes, lockouts and suspensions. The incidence of labor disputes falls with curious regularity in even years. In the years between the negotiation of the wage contracts, when the contracts were in force, there was comparatively little interruption due to labor disputes.

That includes 1919 and 1927. It runs from 1899 to the last year of record which is 1933. It is an annual average for all mines in the country. In the districts that were directly affected by the labor dispute, the time lost would be much greater than the national average. During the odd years the loss on account of labor disputes was relatively small because most of the loss of time arose in the suspensions accompanying the termination of the wage agreements.

(412) The suspension of 1906 was one of the greatest disputes in the history of the American bituminous industry. In that year 211,394 men were technically out on strike or some other labor dispute and almost all of these are known to have been involved in the great suspension which began on April 1, which affected mines in 10 states. In Pennsylvania there were 59,593 men out during 1906 for an average of 66 working days. In Ohio there were 37,636 men out for 71 days. In Michigan there were 3,340 men out for 88 days. In Indiana 15,875 men were out for 63 days. In Illinois there were 49,792 men out for 58 days. In Iowa there were 7,969 men out for 28 days. In Missouri [fol. 346] there were 6,212 men out for 78 days. In Kansas there were 11,827 men out for 59 days. In Oklahoma there were 7,372 men out for 72 days. In Arkansas, a small coal producing state, there were 3,828 men out for 76 days. (413) In 1906 there were 478,000 men on the rolls of the industry. In the suspension of 1906 most of the men went out simultaneously so that the suspension was in effect not necessarily continuously over the entire period but simultaneously in 10 states. In 1908 there occurred another suspension which again affected several states. (414) There were involved 132,000 men in round numbers and it affected a number of states. The year 1909 was a year of peace. When the wage agreement expired in 1910 there occurred another large suspension in which 12 states were affected. In these 12 states there were in round numbers 211,000 men involved in labor disputes that year and their duration ranged from an average of 45 days working time in Pennsylvania to 157 days in Missouri. (415) There were lesser suspensions in 1912 and 1914. The statistics which have been cited relate to what the industry terms "suspensions" rather than strikes. The wage contract had expired and the parties were unable to agree on the terms of re-

newal at some time during this period. The record shows a different type of dispute occurring in connection with attempts to organize the non-union fields. These strikes for recognition instead of affecting a number of states simultaneously, generally affected one field at a time. (416) In 1902 the record shows such a strike or group of strikes in southern West Virginia. In that year 18,129 men were reported by operators as being on strike for an average of 75 days. In Alabama two strikes of local importance occurred and 6,059 men were out for an average of 23 days. [fol. 347] In 1903 there was again a strike in Alabama involving 7,319 men for 32 days. The other significant strikes of this type, involving an effort to organize a non-union area during this period, included a dispute in Colorado from 1903 to 1904 and a dispute in Alabama in 1904. In 1912 and 1913 there occurred a strike for recognition of the union in the Paint Creek and Cabin Creek districts of the Kanawha Valley of West Virginia which was accompanied by bloodshed and declaration of martial law and led to an investigation by the United States Senate. (417) The strike in Colorado in 1913 and 1914 was accompanied by calling out the militia and the so-called Ludlow massacre, leading to the intervention of Federal troops and another Congressional investigation.

(418) I have personal knowledge and experience with respect to the situation during the war. The war resulted in a shortage of coal and a marked increase in price. The average spot price f. o. b. mines rose from $1.30 a ton in August, 1916, to $4.18 a ton in February, 1917. These data are shown in Defendants' Exhibit No. 5 showing the average spot price of bituminous coal in each month from 1913 to 1931. Spot price represents sales on the open or free market as opposed to sales under contract. At any one time a large fraction of the output of coal will be moving on contract, the proportion of spot and of contract varying from field to field and from time to time. It is commonly said in the industry that approximately 25% of the tonnage moves on the spot market and 75% of the tonnage moves [fol. 348] on the contract market. These figures are based upon trade journal quotations taken from the best and most useful of the trade journals, including Coal Age and Black Diamond. It is necessary to rely upon trade journal quotations for the measurement of spot price fluctuations because it is very difficult to obtain information of an ade-

quate character in any other way. (419) The trade journal correspondent visits both the buyer and the seller in the field and matches up what both tell him. On the whole, spot price quotations from trade journals tend to be slightly above the market, if anything, in periods of depression because of the reluctance of the operator to disclose the full extent to which prices have been reduced. Spot prices tend to rise very much above contract prices at times of acute shortage and tend to fall somewhat below contract prices during periods of dull market. The operator's average realization for the year would be a composite of his spot business and his contract business. The average realization or average value per ton f. o. b. mine is shown in Defendants' Exhibit No. 3 and the accompanying table.

The primary cause of the so-called coal shortage during the war period was congestion of railway transportation. At no time during the war was there any lack of physical mine capacity and only for a brief period in the fall of 1917 did labor disputes exercise a serious restraining influence on the *the* national output of coal. (420) Coal mines are dependent upon continuous flow of cars for f. o. b. at [fol. 349] mine in order that the operator can ship his product. Even at the present time, when motor-truck traffic has largely increased, only about 4.6% of the total output of coal is handled in trucks and that part which is sold commercially moves almost entirely in railroad cars. During the war, a number of factors combined to create a congestion of transportation and to prevent the railroads from delivering to the mines what cars they needed to fill their orders. In part, the breakdown of railroad transportation was due to increased volume of business pouring into the United States for the war orders of the Allies. These dealt largely in heavy industry products, involving a large consumption of coal and there was an increase from 500,000,000 tons demand in 1916 to 550,000,000 tons demand in 1917, and to an all-time peak of 579,000,000 tons in 1918. This increase threw an increased burden on the railroads. At the same time, other commodities were flowing in increasing volume. The traffic congestion was especially severe in Northeastern United States where the munitions contracts and heavy coal-consuming industries were located.

At the same time, the price had increased in the way indicated in Defendants' Exhibit No. 5. This led to the

opening of more than 1,000 new mines. In the year 1916 there were 5,726 commercial bituminous coal mines in operation, not including the country coal banks. In 1917 the number had jumped to 6,979. The increase in the number of mines added to the burden on the railroads because it [fol. 350] was necessary to place cars at a larger number of points of origin.

(421) I was attached to the Committee on Coal Production, Council of National Defense, which attempted to handle the problem during the early months of the war. Later I was detailed to assist the statistician in charge of coal in the United States Geological Survey (422) who was at the same time functioning as the Chief Statistician of the Fuel Administration. The Committee on Coal Production did what it could to take care of urgent needs by granting priorities, sending coal which was available to those who had the most urgent need for it. They attempted to control prices by voluntary agreement of producers with the Secretary of the Interior. This proved unsatisfactory to the consuming interests and consumers induced Congress to include in the Lever Act a provision authorizing the President to fix prices for coal f. o. b. mines and to control distribution. The President set the prices August 23, 1917. The Fuel Administration assumed office September 1, 1917. The program ultimately adopted by the Fuel Administration was primarily one of saving coal transportation, thereby making it possible for the railroads to handle the increased demands of consumers for coal and at the same time the other burdens of traffic. As the problem was one of cutting down the number of car miles to be handled by the railroads as far as possible, the country was divided into 13 consuming zones. The coal fields were divided into 27 [fol. 351] producing districts. A budget was set up alloting to each district certain tonnages to move to each consuming area. (423) The general technique of those zones lay in warping toward the East as far as possible the supply of coal arising from the western fields and making available for the eastern markets the coals that were produced in the East. Certain eastern coals were zoned out of the middle western markets in order to cut down the length of haul and increase the turn around of cars and relieve the railroads, thereby increasing the total volume of coal traffic that could be handled. Exceptional cases were taken care of by a permit system, so that a by-product

coke plant in Illinois might receive Pocahontas coal when other consumers, who did not require it in Illinois and could get along with the local coals mined in Illinois and Indiana, were not permitted to have a special permit. The net result of this regulation was to make it possible for the railroads to handle the war traffic. The total output of bituminous coal rose to 12,000,000 tons or more a week during the middle of 1918. On the day of the armistice consumers had been supplied with stocks of 63,000,000 tons of coal which was twice any preceding known stock, and quite sufficient to carry them through a war of indefinite duration.

(424) From the year 1919 to the year 1923 there was an enormous increase in the productive capacity of coal. The capacity increased far in excess of any increase in requirements because in the period of shortage it drove up [fol. 352] prices to heights and made coal mining a highly profitable business during two distinct periods. That lead to the opening of more thousands of mines and to an extension of those mines which were in operation.

(425) By the Court:

The line of 1918 in Exhibit 3 shows that the production was 579,000,000 tons. The figure $2.58 is the average price per ton in the year 1918.

By Mr. Critchlow:

The increase in capacity was a reflection of the very great increase in price. The average value per ton rose to approximately $3.75 during the year 1920 because of the runaway market which occurred that year. The price was again high in the year 1922 in connection with the great strike and the further difficulties at that time. It was this increase in price which led to the opening of thousands of new mines, and to an extension of capacity of mines already in operation, and which brought about an inflation of the total mining capacity as of the year 1923 to 970,000,000 tons as against a demand in that year that would represent 560,000,000 tons. (426) There was an acute shortage of coal in the United States in 1919 and 1920 and shortage began with the strike effective November 1, 1919. Other factors continued to make the market disturbed and the shortage persisted until the late fall of 1920 and early part of 1921. The Federal Government, when the strike broke

on November 1, 1919, invoked the powers of the Lever Act. [fol. 353] The Federal Government restored the regulations of the United States Fuel Administration under the Lever Act, and put into effect the schedule of prices which had been fixed during the war, delegated to a central coal committee, and in the face of the breakdown of the railroads it forced the Fuel Administrator to distribute coal, and he took possession of what coal was on wheels and proceeded to distribute it to the consumers most in need. At the peak there were 415,000 men on strike. These men worked in 22 states. The strike lasted approximately 6 weeks being settled on December 16.

(427) In the week before the strike, consumers had been purchasing 13,300,000 tons of coal, in a last minute effort to build up their reserves. In the first week of the strike the output was 3,600,000 tons, and it rose slightly thereafter. At no time during the strike did it exceed approximately 5,000,000 tons a week which was entirely insufficient to meet the current consumption. The consumer was protected with respect to price by the reinstatement of the war-time Fuel Administration prices. Many consumers found it difficult to get coal. Toward the end of the strike industrial plants along the Atlantic seaboard began to shut down and schools in New York and elsewhere were closed and the settlement of the strike became absolutely necessary.

There were other causes for the shortage than the strike. The shortage lasted from the beginning of the strike to the end of 1920, in all some 15 or 16 months. After the strike [fol. 354] had been settled but before consumers had succeeded in rebuilding their customary stocks another cause of shortage appeared. There was an outlaw strike of railway switchmen which began April 1, 1920 and it congested the terminals of the principal coal-carrying railroads and coal delivering railroads ((428) in the area north of the Ohio and Potomac Rivers, the great industrial center of the United States. That led to an acute shortage of cars at the mine which lasted in its sharpest form for two or three months. At the same time there was another cause of shortage. The British Government had found it necessary to place a limitation on customary exports from the United Kingdom. As Great Britain was the chief supplier of the world's export trade, this had the effect of creating an extremely active demand for the export of American

coal. These three factors acted in combination. Their result was to drive up spot prices of coal to an average for the United States at the peak of $9.51 a ton. Along the Eastern Seaboard where the shortage was greatest and the demand most important, sales of $20 were reported. The average spot price of Pocahontas coal, according to trade Journals in the month of August was $12.90. The average price of Somerset mine-run coal was $11.97.

(429) I should like to add in the interest of clarity and justice to coal operators that these prices were not obtained by all shippers and the average sales realization for the year, contract and spot business, for the country as a whole, was $3.75. This was a very handsome sales realiza-
[fol. 355] tion but was less than the average spot price sales for the year.

There was a coal shortage during the years 1922 and 1923, caused by the great suspension affecting all union mines and the non-union mines in a number of districts in the bituminous coal fields and a simultaneous suspension affecting the anthracite mines. In this strike, 460,000 bituminous miners went out and 73% of the productive capacity of the bituminous coal fields was shut down. At the same time, 142,000 anthracite miners went out. The strike began on April 1, 1922 and lasted officially in all districts until August 16, when there was signed the wage agreement at Cleveland. Thereafter, other districts accepted the agreement and most of the men were back at work in September. (430) The effects of this strike were accentuated by a simultaneous walkout of the railway shop men whose strike began on July 1, 1922 and created a further shortage of cars in the non-union fields and a slowing up of the movement of coal out of the southern districts over the southern railroads. The two forces combined to produce a shortage in that year and resulted in an average spot price f. o. b. mines at the peak of approximately $6 a ton. This shortage had the effect frequenty of compelling the consumer to accept dirty or impure coal which he found difficult to use. It compelled him to accept coal from unaccustomed sources of supply which was not always suitable to his requirements. There were numerous engine failures on railroads as a result of inferior coal which they
[fol. 356] were compelled to utilize. Consumers had to put in heavy stocks, in anticipation of shortage because a probable strike was known for some weeks in advance. Stocks

at the beginning of the strike in 1922 were approximately 60,000,000 tons which is perhaps 30,000,000 above what it might have been had there been no strike in sight at the time. The principal cause of complaint by the consumer was increase in price. (431) The consumer did have to pay an increase. There is an official record in an investigation by the Interstate Commerce Commission of the increase in price of railroad fuel in the year 1920 (Vol. 61 of Interstate Commerce Commission reports, p. 763) showing the average cost of bituminous coal purchased by the carriers per net ton at the mine on the contract market to have increased from $2.56 a ton in 1919 to $3.22 a ton in 1920. The average cost per net ton purchased on the spot market which was the market reflecting the greatest increase in price rose from $2.83 a ton in 1919 to $4.53 in 1920. The shortage was most acute in the region served by the New England railroads.

(432) The developed capacity of mines increased from 730,000,000 tons in 1918 to approximately 970,000,000 tons in 1923. This was accompanied by an increase in the number of mines as indicated in the curve on Defendants' Exhibit No. 4. The number of mines rose from approximately 8,200 in 1918 to 9,330 in 1923. The opening of these new mines and the extension of existing mines led to the recruiting of a large number of men. The number employed [fol. 357] rose from 615,000 in 1918 to 705,000 in 1923. In 1923 the mines were in operation an average of 179 days. (433) The wage rate increased to $7.50 a day in fields in the Illinois district which was roughly typical of all the organized fields. The increase became effective in August of 1920.

In 1920, use was made of the powers of the Interstate Commerce Commission under the Transportation Act to declare priorities in the movement of coal. Those were in part geographical priorities to facilitate shipment of coal to areas of the country that were in particular need and in part consumer classification priorities directing the shipment of coal to those branches of consumption which it was felt were in particular need. During the strike of 1922 another attempt was made to utilize priority powers of the Interstate Commerce Commission at this time associated with an attempt to negotiate voluntary agreements to restrain prices f. o. b. mines. A presidential fuel distribution committee was set up to advise the Interstate Com-

merce Commission in the application of priority powers. (434) In September of 1922, an Act of Congress was passed known as the Federal Fuel Distributor Act of 1922 which was intended to validate the procedure used prior to that time by the Interstate Commerce Commission and to advise the Commission as to which areas of the country and which branches of consumption were in particular need. In 1920 the Indiana Legislature passed a special food and fuel commission act setting up a commission and instructing it to set [fol. 358] maximum prices on coal produced in the State of Indiana for intrastate shipment to consumers in Indiana and authorizing and directing the Commission to distribute fuel at this maximum price to domestic consumers and to other classifications of consumers in particular need.

The law creating the United States Coal Commission became effective on September 22, 1922, and the appointment was made soon thereafter. (436) On Defendants' Exhibit No. 3 the fluctuations from year to year in the curve of production represent primarily the ups and downs of the demand for coal as it is affected by the conditions of general business. In some years the production is not exactly equivalent to consumption because of changes in stocks. (437) In a year like 1919 there may be a considerable draft upon storage in the hands of consumers that does not make it necessary to produce quite as much as the yearly consumption, but if one were to plot the consumption curve alongside the production curve, he would find that it was substantially the same, with the exception of 1919, 1922 and 1923. In 1919 the effect of the great strike of 1919 was to deplete the consumers' stock and consumption in that year was greater than production. In 1922 there was a similar effect. Consumption was greater than production and production was actually curtailed by the strike. In 1923 there were some additions to storage so that consumption was less than there indicated. In the main, the movements up [fol. 359] and down reflect the ebb and flow of business in the fuel-using industries.

The reasons for the change in the general trend of demand which is so noticeable after 1918 are as follows: Prior to 1918 demand had been increasing steadily at a rate averaging 13,000,000 tons a year. Thereafter, it flattens off, and at no time since the war has the demand actually reached the war peak. The first factor was a change in the fuel-using industries themselves, particularly

iron and steel. As the country matured in its economic development, there was a tendency to pass from the production of crude materials, like crude iron and steel products, to more fabricated materials, and there was also going on in the iron and steel industry a substitution of scrap for virgin pig iron. (438) The result was that while formerly the demand for coal in the manufacture of coke, and consequently of iron and steel, had been growing very rapidly, it now began to flatten off. The iron furnaces were supplemented by the flow of scrap coming into the steel mills. Not so much coke was needed and not so much coal was needed. That is one of the major causes of the flattening of demand. This is of importance because the iron and steel industry, next to the railroads, was the largest single consumer of coal.

The second factor was fuel efficiency which had been improving since the first invention of the steam engine. Along about the time of the war fuel economy became an organized movement. The lead was taken by the electric utilities. It was stimulated by the high prices of fuel, as- [fol. 360] sociated with war. The reduction in the unit consumption of fuel which has been accomplished by the fuel engineers in the period since the war is notable. With the steam railroads, from 1919 down to the end of 1933, the reduction in the average requirement to move 1,000 gross ton miles of freight was 28.8%. In the electric power plants the reduction in the amount required to generate one kilowatt hour of power was 53% since the war. In the iron and steel blast furnaces the reduction in the amount of coking coal necessary to smelt one ton of pig iron was 19.6%. In the meantime the by-product oven was saving great quantities of fuel that had formerly been wasted out of the beehive coke ovens, and that saving turns out to be approximately 19% of the total fuel input of the by-product oven. (439) Averaging together all branches of industry and transportation, it is safe to say that the economies effected since the war are between 20% and 30%. In my judgment, that is the largest single factor in the slowing down of the former growth of coal demand.

A third factor was the competition of other fuels and of water power. The Federal water power act, passed in 1920, had opened a lot of new power sites to public development and there was rapid development. Oil and gas continued to increase in production. Probably the greater

part of the oil and gas that have been produced during the last decade has in no sense come into direct competition with coal. Much of it is either used in the field for the pro- [fol. 361] duction operations, drilling the wells and pumping them, or is used out on the Pacific Coast, where coal could not compete, or is refined and goes into lubricants, with which coal could not very well compete. Also, it goes into gasoline which, at anything like present price levels, coal cannot make. Only a minor fraction of the total increase of the production of oil and gas capacity was directly competitive with bituminous coal, but every coal man knows that it has been a factor and that business has been lost both to fuel oil and to natural gas. The net result of these changes was to convert an industry that had for 100 years been used to a steadily growing demand, and had based all its plans and expectations on a growing demand, into an industry that was faced with a stationary demand, and that tended to bring about a very difficult readjustment.

(440) The fact that the demand had stopped growing meant that the tremendous increase in capacity which had taken place during the war was now clearly not needed. Beginning in 1924, the causes of shortage which had hitherto prevented the mines from producing in a period of shortage were eliminated. The car shortage largely disappeared on the railroads through improvements in railroad transportation. The signature of the three year wage agreement between the miners' union and the operators eliminated the prospect of strike for three years. Under those conditions, there was nothing present to prevent the surplus capacity which had been created in the shortage [fol. 362] years from exerting its full effects on the market. The capacity, being 970,000,000 tons, and demand stabilized at around 530,000,000 tons, was so clearly out of balance that a long and very difficult liquidation became inevitable. That has had the effect of intensifying competition and of putting great pressure upon prices and wages.

In 1926 the industry benefitted by two outside circumstances which threw it extra business. Late in the fall of 1925, and continuing through the early months of 1926, the anthracite miners of the United States were on suspension. (441) This lasted about 5 months and a large volume of tonnage which was normally supplied by anthracite was transferred to bituminous coal. Later in 1926, the

British miners went on strike and were out for perhaps nine months. The shortage in the world's export trade created by the withdrawal of British coal during that period threw extra business to American shippers who could participate in the export trade. Those two factors accounted for much of the increase in tonnage experienced in 1926 and temporarily stiffened prices. The effects of this combination of the anthracite strike and British miners' strike can be seen in the record of spot prices for the year. In Defendants' Exhibit No. 5 it appears that in the fall of 1926 spot prices sprang from a level of about $2 a ton to $3.20 a ton for a brief period.

The effect of the deflation I have mentioned was a very drastic liquidation of both mines and plant capacity. The [fol. 363] number of operating mines between 1923 and 1932 fell off from 9,331 to 5,427. This is indicated in the top curve on Defendants' Exhibit No. 4. These properties are commercial mines producing 1,000 tons a year or more. Some of this reduction might be attributed to the effects of the depression of general business. (442) Even if one compares the number of mines operating in 1923 with the number operating in 1930 he finds that there is a net reduction of 3,440 mines for those years. This net decline does not measure the total number of mines that have been abandoned or otherwise forced out of business, being merely the net change in those years.

In the meantime, there had come into existence a very considerable number of small trucking mines utilizing hard roads and motor transport. Mr. Newell G. Alford, a mining engineer, in a paper published in the Transactions of the American Institute of Mining Engineers, presents a study of the records of individual mines on the books of the state mine inspectors and treats the individual cases, 4,800 properties or more, which had been forced out of business since 1923, and concludes that exhaustion of the coal accounted for a very small part of this reduction. There were corresponding effects upon the plant capacity in operation. The total capacity declined from 970,000,000 tons to 770,000,000 tons in 1929, being a reduction of 200,000,000 tons. That, again, does not measure the full extent of the deflation. Meanwhile, a number of new mines had come into existence and the old mines had expanded their [fol. 364] production. Out of these several thousand mines

that have been closed down since the depression began in the bituminous coal business in 1923, there are large numbers that are now idle but not finally abandoned. (443) The Bureau of Mines made an effort to determine the importance of these and as of 1930 we found that there were on our books 1,359 mines of this class, with a capacity when they operated of 130,000,000 tons a year. The evidence that we have been able to collect on the subject indicates that they include an appreciable number of properties that, if there were any sustained advance in price, would come back into the market. They include also many hundreds of mines in all states of collapse and disrepair which nothing but a world war would ever bring back into production. No one can tell how far shut down mines, not formally abandoned, ought to be reckoned with in the production capacity of the industry. If they were all included, the total capacity in 1930 would have been 770,000,000 tons plus 130,000,000 tons. Most of that is known to be so far out of repair and so hopelessly damaged by the long shutdown that it could not come back. Some part of it possibly could. The existence of this idle capacity in shut down mines is a further reason for the long-continued depression in the coal market and one more factor tending to intensify the competition and beat down prices with the consequent results. (444) It is important also to know how far these shutdown mines—1356 in 1930—are still in the picture. I have just had a test made of three of the principal states and we find that in those three state, as of 1930, there were 291 mines shut down but not permanently abandoned of which 203 have since been dropped from our records, the [fol. 365] owners considering them permanently withdrawn. There remain 88 in these three states which conceivably might go back into production, and which go, among other factors, to create the difficult competitive situation that the industry faces.

The effect of these conditions has been that a large profit during prosperous years has been transformed into a heavy and continuing loss as evidenced by the income tax returns made available by the United States Treasury. The Treasury data are shown on the lower portion of the chart in Defendants' Exhibit No. 3, the years of profits being shown in black and of deficit in red, and the data themselves being in a table. (Def. Ex. 6-A). (445) The Treasury data avail-

able for the years 1917 to 1921 are not entirely complete and the profit showing for those years is therefore somewhat less than the industry as a whole actually enjoyed. They show that in the year 1920 the excess of net income of the corporations making an income over the deficits of those that lost money was $249,000,000 odd. There was a net credit balance also in the year 1921 when business in general in the United States was depressed. Data are lacking for the intervening years until 1925. (446) The question marks appearing on Defendants' Exhibit No. 3 for the years 1922, 1923, 1924, 1926 and 1927 are to indicate that the Treasury had published no separate data regarding bituminous coal for those years, but in those years the Treasury combined anthracite and bituminous and the combined showing of the two industries for the year 1922 shows a net of $70,000,000; in 1923 a net of $67,000,000.

By the Court:

[fol. 366] I mean an excess of net income for those corporations that reported net income over the deficits of those corporations that reported deficits. From that and the fact that spot prices and sales realizations were relatively higher in 1922 and 1923, it seems an inescapable conclusion that if the data for bituminous coal had been separated from anthracite they would have shown some excess of income over deficit in those two years. In 1924, the combined record for anthracite and bituminous shows an excess of deficits over incomes of $49,000,000. That, plus the drastic liquidation in the number of mines and capacity in 1924 and with falling prices in that year, appears to indicate that all losses for the combined group could not possibly have been due to anthracite.

By Mr. Critchlow:

I do not happen to have the data here with reference to 1926 and 1927. (See Def. Ex. 49.)

(449) From the period 1923 to 1933 wage rates have been declining over the period as a whole. The extent of the decline and the dates at which it took place are indicated in the charts of wage rates and earnings given in Defendants' Exhibit No. 4. (450) The exhibit shows three different indicators of the trend of miners' wages. This does not purport to show the annual earnings of miners but

merely daily rates or daily earnings. The first of the indicators selected to show what the trend has been is the Illi- [fol. 367] nois day scale for skilled inside labor to which reference has already been made. It is indicated by the dotted line. As the Illinois district was completely organized throughout this period, wage rates in that field have changed by sudden steps at periods when there was a change in the wage agreement. As of 1923, the day rate was $7.50; the point which it had reached by the wage agreements in August, 1920. The miners' union in that area remained strong enough to hold it at the $7.50 level down to late in 1928, at which time, due to the competition of other districts and particularly of the non-union fields, it was forced down to $6.10 where it remained for a period ending in 1932 and then dropped to $5. The second indicator of the trend of wages, selected merely to indicate a change from time to time, is the average earnings of all day men in the State of West Virginia, covered by the periodic wage surveys of the United States Bureau of Labor Statistics. This Bureau cannot attempt to cover all mines but has selected a sample covering a considerable number of mines in each state and at intervals of two years it makes a close examination of the books of those mines to find what has been the average earnings during one typical pay period. (451) For the State of West Virginia the record compiled from the publications of said Bureau is as follows: The sample made in 1919 shows the average earnings of the day men were $4.09. They rose to a high of $5.87 in late 1921 and early 1922. The next observation made in 1924 shows that they had dropped to $4.93 where they [fol. 368] stayed with slight reductions until the beginning of the great depression, and in February, 1933, the sample showed an average earning of $3.25. It is significant that the drop in the daily earnings, which means essentially wage rates, in the State of West Virginia, came four years before the drop in the Illinois rate, indicating the competition to which the northern districts, as represented by the State of Illinois, were subjected during this period. The third barometer of wages indicated on this chart is the average daily earnings in the State of Tennessee for day men, also developed from the Bureau of Labor Statistics. The Bureau seems not to have made any canvass of Tennessee mines in the years 1921 and 1922 so the chart shows

the record beginning with 1924 in which the average was found to be $3.55, which fell by degrees to $2.66 in early 1933. (452) These are shown on the table (Def. Ex. 4-A). The working time tended to increase for a while due to the fact that the number of men on the rolls had been drastically reduced by about 200,000 workers between 1923 and 1930, which drop is shown in the line marked "then employed" in Defendants' Exhibit No. 4. The fact that these men were forced out of the industry and that the mines in which they worked had also shut down made it possible for the remaining mines to operate far more steadily and the average working time for the mines that remained in business increased from 179 in 1923 to 219 in 1929, the latter figure being still less than the average in 1913 the last prosperous year before the war. (453) What a man [fol. 369] can make in the course of a year depends on his daily rate and on the amount of time that he has to work. (454) During the prosperous years before the reductions in the wage rates, there were masses of men in the mines who earned in the neighborhood of $1,100 and $1,200 and some much more and some not anywhere near that much. You can get a rough picture of what these day men would be making in the year 1932 if you take the Bureau of Labor Statistics findings as to their average earnings in the month of February, 1933, and multiply that by the number of days the mines worked in 1932. In West Virginia, the product of days times the February, 1933 rate would be a yearly income of $546. In Illinois, if you take the days times the union rate, $5, the individual income would be $560. In Tennessee, if you took the Bureau of Labor Statistics findings as truly representative, the annual earnings would be $394. These are the day men, not the tonnage workers, who sometimes make less and have often made more. The Bureau of Labor Statistics samples are thoroughly comparable from time to time, but, in my judgment, may not show the full depths to which the reduction of wages went during the years of the depression. The list of mines has been brought to my office for checking. I have examined the mines that are counted by the Bureau of Labor Statistics in its findings for the States of West Virginia and Tennessee. (455) They include a number of large mines and are heavily weighted by the bigger mines and especially the captive mines. On the whole, those mines have [fol. 370] maintained wage scales rather better than the

little properties. It is therefore more than possible in my judgment that a complete count of all the mines in the State of Tennessee would have shown average earnings materially less than $2.66 a day in 1933. I think we all of us have seen mines where rates were lower than that figure. (457) I have prepared or had prepared under my direction from data in the Bureau of Mines a table entitled "Disposition of total output of bituminous coal mines of the United States, by years, 1915-1933". By "shipment" in the second column is meant loaded at the mine in a railroad car or in a few local instances in a river barge for shipment by rail or river. In the next column is the percentage that that item bears to the total production in the country. (458) With respect to the column entitled "Truck or Wagon Commercial Sales" there have been wagon sales at least from the earliest times, but there was no separation made of them in the statistical records prior to 1932 or 1933. They were included in the caption "Other Sales to Local Trade, Used by Employees, or taken by locomotive at tipple". In 1933 for the first time we obtained an accurate separation, which warrants publication under the name "Truck or Wagon Commercial Sales". It was found that in 1933 that constituted 4.6% of the total output of coal. With respect to the column "Made into Coke at Mines" there are data in our Bureau as to what happens to that coke after it is made at the mines. Virtually all [fol. 371] the coke as it is drawn from the beehive oven at the mine, is loaded into railroad cars or very rarely into a river barge and shipped away. According to our latest accounts, there are three coke-oven plants in the United States that are still using some coke they produce in an affiliated factory right at the mine. But for practical purposes, all the coal that is charged in beehive ovens at mines, either 24, 48 or 72 hours later is loaded on railroad cars or on a river barge and shipped away. (459) The first column entitled "Loaded at Mines for Shipment" is the total shipments whether intrastate or interstate.

(460) [The table was offered and received in evidence as "Defendants' Exhibit No. 8 for Identification".]

I have prepared or had prepared under my direction from the records of the Bureau of Mines a table entitled

"Distribution of bituminous coal produced in 1929 according to the records of the United States Bureau of Mines, grouped by State of origin". (474) [The table was offered and received in evidence as Defendants' Exhibit No. 9.]

A map has been prepared based upon the table which has been marked "Defendants' Exhibit No. 9". Certain additional details have been entered on this map to indicate the distribution of coal shipped to tidewater, as to what states it is known to enter into, and certain additional [fol. 372] details to show which of the New England States have received coal from the origin districts represented. (475) [A map entitled "The Interstate Movement of Bituminous Coal in 1929, as shown by the reports of the United States Bureau of Mines" was offered and received in evidence as Defendants' Exhibit No. 10.]

A map has been prepared based on very familiar public data in the Annual Report of the Bureau of Mines. It shows graphically the total production of bituminous coal in each state and the portion thereof that was shipped by rail or water or shipped out in the form of coke. (476) It is for the year 1929. [The map entitled "Production of bituminous coal and total rail (or water) shipments, by States, in 1929" was offered and received in evidence as Defendants' Exhibit No. 11.]

By the Court:

The figures under the small heading represent production for that year in that State, I believe in millions of tons.

By Mr. Chritchlow:

I have prepared a chart entitled "Distribution of Pocahontas-Tug River coal, 1929" which shows graphically the consuming states in which coal produced (477) in the Pocahontas-Tug River district of southern West Virginia, in- [fol. 373] cluding a small overlapping in the adjoining State of Virginia, was distributed in 1929. It is based wholly upon Defendants' Exhibit No. 9 or upon another table which is in the set of exhibits, with the single exception that the relative importance of the tidewater movement of coal to certain points of destination, has been added graphically on this map. [The chart was offered and received in evidence as Defendants' Exhibit No. 1[illegible].

I have prepared a table headed "Distribution of the supply of bituminous coal from each originating district in 1929, divided between interstate, intrastate and railroad fuel." (478) This was compiled on data of the Bureau of Mines under my direction. [The table was offered and received in evidence as Defendant's Exhibit No. 13.]

I have prepared a table headed "Distribution of the total national supply of bituminous coal in 1929, divided between interstate, intrastate, and railroad fuel". (479) [The table was offered and received in evidence as Defendants' Exhibit No. 14.]

I have had prepared under my direction a table entitled "How intrastate rail shipments of bituminous coal to Indianapolis meet competition from interstate rail shipments (1929 data)". [The table was offered and received [fol. 374] in evidence as Defendants' Exhibit No. 15.]

(480) I have prepared or had prepared under my direction a table entitled "How intrastate rail shipments of bituminous coal to other large cities of Indiana, Illinois and Ohio meet competition from interstate rail shipments (1929 data)". [This table was offered and received in evidence as Defendants' Exhibit No. 16.] This table is based upon the detailed records of two railroad traffic bureaus, one called the Illinois Freight Association and the other called the Ohio Bureau of Coal Statistics. All cities carried on the books of the two traffic bureaus in such form that they could be matched up, say a figure from the Illinois Bureau be placed alongside a figure from the Ohio Bureau, were used in this compilation. (481) Then there was a certain lumping of destination groups "all other Illinois" and "all other Indiana," and they were left out as having no significance.

[There were then marked for identification and subsequently received in evidence the following: Table entitled "Bituminuos coal loaded for rail shipment on origin railroads in the Appalachian districts north of Alabama—Northern Railroads" as Defendants' Exhibit No. 17 for identification; table entitled "Bituminous Coal Loaded for Rail Shipment on Origin Railroads in the Appalachian Districts North of Alabama—Southern Railroads" as De- [fol. 375] fendants' Exhibit No. 18 for identification; and table entitled "Recapitulation of Bituminous Coal Loaded for Rail Shipment on Northern and on Southern Railroads

in the Appalachian Districts North of Alabama" as Defendants' Exhibit No. 19 for identification.] Table 19 is a recapitulation of Tables 17 & 18.

Cross-examination.

(484) By Mr. Whitney:

Referring to Defendants' Exhibit No. 4 and to the table at the bottom thereof and my testimony in connection therewith I meant that the two-year interval for wage agreements, falling in the even years, related to the period before the world war. During that time from 1900 up to 1916 the agreements had run for two-year spans and they happened to expire in the even years. My recollection is that the agreement was reopened in 1917, a period of rapidly advancing prices and costs of living. (485) The miners had a real case for a substantial increase. That agreement was supposed to run for two years or until the expiration of the war. There was no wage agreement in the year 1918. A new general wage agreement took effect April 1, 1920, resulting from the award of the United States Bituminous Coal Commission of that year. That agreement ran for two years expiring March 31, 1922. It was renewed for two years more expiring March 31, 1924. The Jacksonville wage agreement which became effective April 1, 1924 ran for three years to March 31, 1927. There was great difficulty in renewing that and thereafter the sequence is not uniform in the different districts. In Illinois an [fo. 376] agreement was reached late in 1927 to run for one year, at the termination of which there was another tremendous suspension and a renewal was reached to run until 1932.

1929 was a year in which no important district had a wage contract that lapsed. (486) It was a year of somewhat larger consumption than the two preceding years. It represented the end of the general business prosperity of the United States and for bituminous coal was a year of somewhat larger demand than immediately preceding, and probably more active markets. As for labor disputes it was a year in which there were no major wage contracts expiring. It was reasonably representative of the average of the period 1927, 1928, 1929 and 1930.

(487) Labor disputes are associated with the whole picture. They are caused, to no small extent, by the competitive pressures. They result in differentials in wages. I do not believe that it follows from the fact that there were no days idle in 1929 on account of strikes and that 1929 is fairly representative of the period 1927-1930 that industrial disputes do not make much difference to the industry as a whole. (488) In 1926 a British strike was one of the factors that underlies the substantial increase in spot prices indicated in Defendants' Exhibit No. 5. I am not sure that it was the principal factor. I would say that its effects were about equally divided with the knowledge the consumers had in August that the Jacksonville wage agreement was going to expire on March 31 and that they ought to lay in heavy stocks. Stocks of coal were relatively small [fol. 377] in the middle of 1926. Between that period and March 31, 1927, the consumers built up their stocks to 75,000,000 tons.

The chart (Defendants' Exhibit No. 5) is reproduced from the drawing in the annual coal report in the Bureau of Mines. (489) Assuming that the chart is plotted correctly, the data are reliable. The little captions on it were thrown in for purposes of illustration.

(490) The cause for the rise in spot prices from approximately $1.25 to approximately $4.15 in the year 1916 on the same Defendants' Exhibit No. 5 was due to the coming on of the Great War, the piling up of munitions orders from the Allies in the eastern states, and the resulting congestion of rail transport intensified by the sheer increase in volume of coal loadings. That increase had very little relation to strikes. It was not due to unfair competitive practices in the industry. (491) The decline in spot prices in the summer of 1917 from approximately $4.15 to approximately $2 was not due to labor disturbances. That was the result of the president's order fixing prices under the powers conferred upon him by the Lever Act. The preceding price represented what the semi-voluntary efforts of the Committee on Coal Production of the Council of Defense had been able to effect in the way of voluntary agreements among producers to limit prices. This Committee pushed the spot price down halfway from where it had been on a perfectly free and run away market to the level which the President finally set as fair.

(492) The primary cause of the decline from $6.13 in August to $5.05 in September was the signature of the [fol. 378] Cleveland wage agreement which resulted in the field beginning to go back to work. The upward pinnacle carrying spot prices up to $6.13 does not give a fair impression of the level of sales realizations in 1922. I was careful to try to so explain. This represented the movement of the spot price. The coal that was under contract continued to move at much lower levels of price. The little pinnacle in 1926 does not give a fair impression of the level of sales realizations in 1926. It is intended to represent the movements of the spot market. Sales realizations are covered in Defendants' Exhibit No. 38. (493) Exhibit No. 5 represents the average of the spot price quotations for the U. S. as a whole. On the whole, the railroads with their tremendously concentrated buying power have been able to get coal at relatively lower prices. That is one of the complaints of the shipper, that the railroad butchers down the price. I think it is generally known and realized that the carriers have taken advantage of their buying powers. (494) The average of all the spot price quotations for the whole year 1920 was $5.64. That is higher than what the railroads reported that they had to pay on spot markets. In that year, 1920, the roads purchased 19.3% of their total supplies on the spot market. (495) The conditions in the market to which the railroads are subject are fully and in detail explained in an Interstate Commerce Commission report. In the New England states which were along the seaboard and therefore felt the shortage more, the spot price average cost jumped from $2.46 in 1919 to $6.25 in 1920, an increase of 154%.

Not since the end of the 1922 market, which I would place in the first five months of 1923, have there been any runaway markets. The only approach is the increase in the fall of 1926 associated with the British strike and the heavy [fol. 379] purchasing for storage in anticipation of the wage suspension.

(496) That market pushed the spot prices up only about $3.20 as compared to $9.50 in wartime and over $6 in 1922 and over $4 in 1917.

I would not say that in the light of those conditions the curve from 1923 through 1931 showed violent fluctuations.

The chart stops in 1931 because the Trade Journal "Coal Age" in which the original quotations were published suspended publication of them at that time. I have checked the weights used and I have, every year, verified the average of the spot prices against the average sales realization for that year, to see if they bore a reasonable relation, and I am satisfied that this exhibit and the tables on which it is based are as accurate a picture of the movements of the spot prices as men in the United States will ever know during this period.

(497) The figures I testified to earlier about prospective recoveries of oil in 1929 were not meant to be precise. Ralph Arnold is a distinguished geologist and W. J. Kemnitzer is a well-known one. They reviewed all the geological literature. They applied decline curves to the indicated reserves which they found. They were specifically allowing not merely for the known fields but for what they thought would be discovered. Such knowledge as I have would indicate to me that the conclusion which Arnold and Kemnitzer reached as of that date was still a reasonable presentation of the order of magnitude of the life of the reserves of the United States. (499) I think, yes, so far as my competence extends—which is certainly very limited, I think that these statements are substantially indicative of what the future prospects for oil and gas in the United States are. I think today that it is a reasonable picture to say that the prospect is that oil will last for about 23 years and then enter a period of decline and be exhausted about 110 years thereafter.

The United States Geological Survey places the present developed water wheels of the United States, as of January 1, 1935, at 16,075,000 horsepower. It estimates that the potential power available 90% of the time, including that which has already been developed, is 41,000,000 odd [fol. 380] horsepower, and that the potential power available 60% of the time is 60,000,000 horsepower. Past experience indicates that water wheel development will go somewhat beyond the amount of power available 60% of the time. (500) For very rough purposes of calculation the Geological Survey have assumed that ultimately there might be as many as 80,000,000 horsepower. Today there is 16,075,000. However, the potential power includes everything that might ultimately from any conceivable engineer-

ing point of view be useful. Water power ranges through very wide limits from streams with a great volume of water to little streams with enormous variations in flow. Niagara can give some of the cheapest energy in the world but the great bulk of undeveloped water power is in streams of a type that are not very promising. If you assume that at some distant future every single horsepower of that 80,000,000 were developed, that it operates at 40% capacity at the present thermal efficiencies, 1.4 pounds per kilowatt hour roughly, it would mean that 147,000,000 tons of coal would be replaced. (501) That is a minor fraction of the 500,000,000 tons of annual output and cannot be reached for many decades. By the time the water power is developed to anything like that scale from our 150 years' past experience the people of the United States will be using twice or three times as much energy as they do now. The energy requirements of the United States in the future will have to be met principally from bituminous coal. Water power has made incursions into the use of bituminous coal. The devel- [fol. 381] opments now under way, the Tennessee Valley and some of the other public power projects that are in areas where coal has a chance to compete are going to take business from coal. (503) In those estimates, the Geological Survey does not take account of the harnessing of the tides so that developments such as the Passemaquoddie Dam might be in addition to those estimates as sources of power.

I do not know how the wage rates compare as between the United States mines and the British and German mines. I assume generally that the money wages are higher in the United States than abroad. I am not sufficiently familiar with British and German conditions at the mines to answer offhand what the average daily earnings in those mines might be at any particular time. I compute these average outputs per man per day for the United States, and I exchange them with people abroad who are responsible for doing the same thing there. These computations were reconciled in my office.

(504) With respect to Defendants' Exhibit No. 4 I cannot testify of my own knowledge whether the workers in Illinois actually received the wage scale noted by the line called "Union day wage scale in Illinois". The line purports to be the rate, the contract scale. The line "West Virginia day men's earnings" is the average rate received

by the men, according to the findings of the Bureau of Labor Statistics. The two are not specifically comparable. (505) My recollection is that the average daily earnings for all day men in Illinois as reported by the Bureau of Labor Statistics happen to be somewhat larger than the $7.50 rate. The reason I plotted the $7.50 base scale is that it happens to be of record all the way back. In the days before the war there were just no studies of miners' average earnings. There are none for West Virginia, for the southern fields. (506) My chart and the table say "Illinois scale, inside day [fol. 382] men, trackmen". This is the rate for trackmen. (507) There are many occupations inside of mines and outside of mines. The Bureau of Labor Statistics findings is the average of all those men paid by the day instead of by the ton. It happens that in Illinois there are a number of rates that are over $7.50. A motorman makes more than $7.50. Some of the other skilled occupations are less than $7.50. The work sheets show the actual average daily earnings of all day men in the State of Illinois as follows: In the year 1921-1922, daily earnings $7.66 and trackmen's rate $7.50; in 1924, daily earnings $7.55; in the year 1926-1927 they are $7.76. Men get different earnings at different times. (508) There is no change in interstate commerce in coal from Illinois if a West Virginia day man were to move to Illinois and receive the same pay as an Illinois day man, assuming the man from Illinois whose job is taken goes down to West Virginia and replaces the other. I was trying to put on one chart some indicators that would show the broad trends of this industry over a period. I was asked to give the trends of wage rates and I thought that these would be as indicative as any others.

(515) I have prepared or had prepared under my supervision a chart entitled "Total delivered cost of bituminous coal purchased by Class I railroads in the United States and average cost per net ton". [This chart was offered and received in evidence as Plaintiff's Exhibit No. 58.]

(516) I believe that this chart shows that there was a [fol. 383] very sharp increase in the year 1920 over conditions in 1919 and that again the price in 1922-1923 was distinctly above the general levels of the period. The drop after 1922-1923 is much sharper than the drop which is to be observed in any other equal time thereafter. There was a large increase in the average cost between the years

1919 and 1923. I think that it is a fair statement that since that time the fluctuation has not been very violent. The period of violent fluctuation I described as the post-war period shortage, the period lasting from 1919 to 1923. The war contributed to all economic circumstances and conditions for years thereafter just as economists think it contributed to the great depression of 1929. (517) There were also many other immediate and direct causes. I do not see how you could explain the great strike of 1919, lasting six weeks, simply as a war phenomenon, or the great depression of 1922, or the shortage of cars on railroads and general transportation disability of those years. There was, of course, an increase in cost of living in 1919 and that was cited by the miners' union as a justification for their demand for an increase in wages which was one of the points at issue in the strike of 1919. The principal cause of that increase in the cost of living was the upward movement of commodity prices associated with the war.

(518) During the war the Fuel Administration was able to accomplish little during the first six or eight months from the period of September 1 until about March of 1918. It [fol. 384] took office at a time when the shortage caused by the war was so far under way that little could be done except to police fixed prices at the President's order and to take care of the most urgent demands by priorities. After the Fuel Administration was adequately organized and after it developed its budget for the distribution of coal and adopted its zone system, its work was a conspicuous success.

(520) I do not know how many persons were massacred in the so-called Ludlow massacre to which I previously testified. I only know that it was so called in the newspapers at the time. Any knowledge I had of the existence of the Ludlow massacre was derived from newspapers or from journalistic reports. (521) The number of men involved in the strike would not bear on the question as to whether it should properly be called a massacre. In 1914, the average number of men employed in the industry was 584,000. I should have to refer to the data to supply the figure as to how many were involved in the strike at Ludlow.

(522) According to professional paper 100-A of the United Statss Geological Survey, the total quantity of reserves of coal estimated to be underground in the United States is placed at 3,535,000,000,000 odd tons. Taking the

production for the year 1929 of bituminous coal at 530,000,000 tons and of anthracite coal at 70,000,000 tons, allowing for loss in mining and average recovery of about 65% of the total of bituminous coal and 60% of the total of anthra- [fol. 385] cite, (523) then that 600,000,000 tons a year would represent an annual drain of 1,000,000,000 tons. Roughly, the number of years the coal supplies would last would be approximately 3,500 years. At the present time the production is far below the total that I mentioned. If we were predicting as of 1934 production, the reserves would exceed 3,500 years. The best years indicated a rapid growth and some allowance must be made for the expected demand. The bituminous coal industry has not been a growing industry since the war. (524) To gain any clear conception of what the life of the coal would be it is necessary to consider by classes and grades and not to talk in terms of national totals. The great bulk of the huge total of 3,500,000,000,000 tons consists of coal so low in grade or so deeply covered that they have but slight value at the present time. (525) The largest single element in the total is bituminous coal of which there are estimated to be 1,440,000,000,000 tons. Besides that there are 1,200,000,000,000 tons of sub-bituminous coal which is distinctly inferior to bituminous. Then there are 1,000,000,000,000 or more tons of lignite which has a heating value of barely half that of good bituminous coal. The production of any mineral tends to be segregated into the more accessible and richer deposits. It is so in coal mining, and at the present time our national output is coming from the cream of our resources, from the high grade coals, the thick coals, the easily accessible ones. Considering the rate at which coals of present market value are being used in many districts the picture is very different. The life of the Pittsburgh bed in the State of Pennsylvania is good for about 100 years at the 1929 rate of production. The life of the famous smokeless coals of southern West Virginia has been placed by very eminent authority, H. N. Evanson at 4.8 billion tons. That [fol. 386] is to say, the reserves of coal beds of present commercial value, 36 inches or more thick. At rates of production as at 1929 that is good for about 85 years. There are of course large tonnages of that area of much thinner beds and in due time (526) as the thicker beds are exhausted, the mining will proceed to the thinner ones.

Smokeless coals compete with other forms of fuel, as does central Pennsylvania coal. These other forms give the prospect of lasting upwards of 85 or 100 years. (528) The 1,440,000,000,000 tons of bituminous coal divided by the 1929 rates of production and allowing for loss in mining as of that time would last approximately 2,000 years and at the rate of the 1934 production would last longer. I have no personal or expert knowledge as to whether methods of mining have improved from 1929 to 1934 but my impression is that they have not. On the whole I think the waste is greater than it was. The anthracite reserves are 29% exhausted. I should say they are of a magnitude to last between 100 to 200 years. (529) I would say that those grades of coal such as anthracite and high grade bituminous need conservation more than coals of a class which may last several thousand years.

I would place the conservation of petroleum as of the most immediate, urgent and pressing importance as between oil and coal. But the problem of conservation is important in all these resources. We cannot afford to neglect either the liquid fuels or the solid fuels. (530) The necessity of conservation of the better coals is also of immediate, pressing and urgent importance.

[fol. 387] I do not know of any source of prediction in this country as to natural resources that is more reliable than the United States Geological Survey. About 1919 to 1921 it was the feeling of many geologists that natural gas had reached its peak and that the problem was to conserve the waning supply. Since then that condition has changed radically by reason of the discovery of new deposits in the southwest and most of all by the development of improved methods of pipe-line transportation, which has widened the radius of pipe-line transporation from approximately 300 miles to 1,000 miles or more. Predictions as to the life of natural resources have frequently been revised in the light of changing experience. (531) Scientists have to be constantly shifting their conclusions as the premises upon which the conclusions are based themselves shift. When the City of Boston was building King's Chapel in 1745 concern was expressed about the sufficiency of the local supply of granite.

The condition of over-capacity in the bituminous coal industry has been in existence as far back as we can push the statistical record. The census of 1880 indicates it was as

much then as in 1890. The chart (Defendants' Exhibit No. 3) indicates that throughout the period when it could be accurately measured, from 1899 to date, there has been a surplus but never as great as developed in 1923 and never with as disastrous consequences.

From time to time shifts in market demand have occurred throwing tonnage from one district to another, (532) [fol. 388] Throughout our national history there have been great changes in the districts which produced coal. There have been very great shifts, resulting from the opening of more districts and more mines which have very largely ceased during the last ten years. There is now opening up in the south another field, the so-called Grundy field, but there are not many developments of that kind at present, nor for the last ten years. There have been during that period of ten years very great shifts in the sources of national supply. It is my opinion that if a scheme to preserve districts in the same proportions they now have were held indefinitely over decades of time and no allowance were made for departure from it, it would be unwise and unfortunate in its results. Compared to the sharp shifts in business which have occurred during the last ten years, I think a very decided degree of stabilization of relative tonnage between districts would be to the advantage of all concerned in the industry. (533) By all concerned I mean especially the operators and miners and districts. The welfare of the consumer also depends upon the welfare of the industry. The consumer has not only an immediate interest in prices, but a very great interest in the success of the whole national economy. And the existence of that national economy of one great industry which is in a condition of financial prostration, and unable oft-times to pay adequate wages, does harm.

(534) I do not know what is an adequate wage. I previously testified that in many instances operators were not paying adequate wages. I testified that the average annual income of a mine worker in Tennessee in the year 1932 in day men's classification would be $394 in those mines covered by the Bureau of Labor Statistics sample for that year. [fol. 389] This was the lowest of the earnings that I gave as typical. I could not give the average earnings in the year 1932 of farm laborers in Tennessee. $394 is far be-

low what men in many parts of the United States were earning for that year. (535) I would say the general condition of life among the hill people of Tennessee is below a reasonable standard of life—far below what the common conscience of the country, or the joint negotiations of employers and workmen in industry ought to set as a reasonable level; far below what a minimum wage should be. I personally think it would be highly desirable to provide a higher income.

A stabilization of production of coal will not necessarily stop shifts in market demand. I believe that the power that can control railroad expansion could go far in the direction of exercising a power tending to stabilize the coal industry.

(536) Surplus of capacity would always be present and if minimum prices were not deliberately adjusted to encourage seasonal buying in the off season, the seasonal problem would be much as now. However, if prices are set at minimum levels and are effectively policed and maintained, the result on the financial position of the industry will be beneficial from the point of view of lessening the present financial losses of the operator and of making it possible for him to pay a reasonable wage. (537) I believe the collective effect of the Guffey Act would be to stabilize prices, to increase the sales realization of the operator, to enable him to avoid some at least of the present loss incurred, and to enable him to pay some higher wage than [fol. 890] he would otherwise be able to pay.

I think prices would be higher than they would otherwise be, at the same levels of production cost, under the Act. It is the normal tendency in mineral economics for increases in prices to lead to increases in number of mines or wells. It is the normal result in increase of number of mines that capacity increases. Over-capacity is the fundamental and underlying evil of the coal industry. (538) Increases in prices, under any system of stabilized control of the market, will in time need to be accompanied by some control of sales tonnages, or some control of capacity, in order to be effective over the long run. It is not my judgment that moderate increases in prices under the circumstances I described would have any great effect on immediate increase in capacity but any long-continued application of an attempt to stabilize the market by the setting of minimum prices would have to be accompanied by some

control of supply and of capacity. (539) I would say that out of idle mines not permanently abandoned a sustained increase in the average price sufficient to give the industry a small profit margin might call back into operation 5% of capacity.

[fol. 390½] It all depends upon the amount of increase in price, of course. I should think that 5 per cent was an upper limit of the amount that might be anticipated as likely to return.

The average sales realization in the industry declined from $2.68 in 1923 to $2.06 in 1926. A decline of that amount would normally tend to decrease the number of mines. You asked for the decline in average sales realization, and I gave it. That of course does not tell what the decline in producers' profit was. This is just the price at the mine. I had in mind, in prospective in price, such an increase in price as would likewise give a larger spread between cost and price.

(540) I could not answer how much of increase in price would be necessary to give a fair wage to the Tennessee day men and the other miners.

I was thinking not of the total cost at the mine, the total sales realization at the mine, but of the increase in the profit margin, and I visualized conditions under a system of minimum prices that would yield a somewhat larger profit margin to the typical operator. That profit margin would be independent of the source of production in the sense that the cost of production reflect the wage rate. (541) I would say that such an increase in capacity as 5 per cent might come about from changing a deficit in average sales realization to an increase of approximately 5¢ a ton in profit margin independent of the cost of production. (543) I would base that statement on the experience under the code. If I recall it correctly, the average profit for Division I in the year 1934 was 1¢ or 2¢ a ton. Under that incentive of higher prices there were some mines reopened and there were a number of small truck mines reopened but there were no marked increases in capacity so far as our records indicate. We do not have the final records for 1934. (544) Increases [fol. 391] in prices tend to increase capacity in proportion to the increase in profit margin over and above cost. It all depends on the amount of the profit margin. (545) The deflationary effect of prices from 1923 to 1926 decreasing

the number of mines from 9,331 to 5,427 was a decrease of approximately 42 per cent.

During that period there was evidently a very great reduction in the typical profit margin.

(541) I would say that such an increase in capacity as [fol. 392] 5 per cent profit margin for a period of time would have a cumulative effect. When I said 5% I was thinking of a period of two or three years. It would be only a very wild estimate but I think that the change in the capacity at the end of two years, say, might reach 5% and that after that it would increase somewhat—not much. (548) The presence of shut down mines, some of which might physically reopen, is, in my judgment one of the elements in the intense competitive pressure in the industry. (549) The fact of surplus capacity, the fact that labor costs constitute 65% of the total, the fact that it is difficult to reduce prices without reducing labor costs, the character of coal demand, the fact that if you throw a small tonnage on the market above what it will absorb, the price will be seriously depressed, just as if you withhold a very small portion during periods of shortage of what the market needs, the price will rise to famine heights, are other elements resulting in intense competitive situations. A small change in productive capacity can increase the competitive pressure if not controlled. It cannot force a great reduction in price because the price cannot go more than about so much below cost without again killing people off.

(550) The features of the Guffey Act to which I have given substantial attention are the marketing features, the general concept of minimum prices as an aid to stabilization. By stabilization, I mean an attempt to put the industry on a basis on which heavy financial losses can be turned [fol. 393] into a reasonable profit and in which the industry will be able to pay reasonable rates of wages. I have no data as to whether there was any great difference in the cost of living as between Illinois and West Virginia in 1933. With respect to my previous testimony that in that year a day man made $560 and a day man in West Virginina made $546: (551) In the years prior to 1933, Illinois production had very greatly decreased. West Virginia production had greatly increased. I see no difference to the national public welfare whether the $550 goes to a coal miner in Illinois

or to a coal miner in West Virginia. Illinois and West Virginia sell in some of the same consuming markets. Chicago is such a market. So far as labor costs are concerned, West Virginia must pay somewhat lower wages per ton than Illinois to compete in the Chicago market. This is because there are somewhat higher freight rates per ton from West Virginia. (552) It is true that in the course of a year an individual coal miner in West Virginia who wants to earn the same annual income as an individual miner in Illinois must dig more coal in order to do it, speaking particularly of the day man.

By stabilization I do not necessarily have in mind the possibility of a given consuming area being supplied generally by the same producing areas which were supplying it as of the time as of the stabilization. I think the concept does imply that during the period in which the attempt to control the market is in effect the supplies derived from various producing districts directed to a single consum- [fol. 394] ing area will be roughly constant, in proportion, but it does not imply that they should be fixed with reference to any specific standard, or date or time. (553) I think that whether it would be unsound to try to fix that as of a particular date or time would be entirely a matter of judgment and the responsibility upon the part of the agency attempting to make the determination. In my opinion it would not be sound to fix stabilization as of a single particular date or time. If it were so fixed it would inevitably follow that the district which had been growing would tend to cease to grow proportionately in respect to other districts. The coal market as a whole over the entire years has been relatively steady from 1918 to 1930. Therefore, it is true that increases in production in given territories have necessarily been principally at the expense of the production of other territories. The total increases in tonnage in one area have been compensated for somewhere else by a roughly equivalent decrease in some other area or in several. (554) There was a tendency for employment to fall off greatly in areas where production had fallen and there was in some districts a tendency for employment to increase where tonnage was increasing though, on the whole, the increasing tonnage in the districts that grew was attained by operating the mines more effectively or by the tendency to-

ward reducing man-hours per ton which was going on everywhere in the industry. In my opinion, it is not bad for mineral economics in the United States to operate mines more productively and economically.

[fol. 395] I have previously testified that 1929, in which there were no disputes, was fairly representative of 1927 in which there were substantial disputes, that representative character being only as to production and marketing. As the spot price record shows, between 1927 and 1929 there was no very great disturbance of the market and no very great increase in price. (555) We have no record that any consumer of coal in the United States actually went without it in that year (1927) because of a labor dispute.

I should like to make a correction of my previous testimony with respect to the cause of increase in spot prices in 1926. I can now say that the British strike was the principal cause and that the other cause, the heavy purchasing for storage, largely motivated by knowledge that the Jacksonville wage agreement was shortly to expire, was auxiliary and supplementary to it. Both factors combined to produce the effect but the British strike was the largest single factor. (556) I should not think that any increase in wages to miners in Tennessee would have any effect at all upon curing the difficulties of interstate commerce arising out of the British strike.

If there is a local strike in a single mine or a little group of mines belonging to a single company that could not have an appreciable effect on the national supply of coal. The little deficit created would be quickly made up by competing [fol. 396] mines nearby.

Redirect examination.

By Mr. Critchlow:

With respect to the spot price chart (Defendants' Exhibit No. 5) I find that the draftsman has omitted certain minor captions explaining ups and downs in the curve. The minor increase in price which appears late in 1915 and early in 1916 is indicated in our official diagram as being related to the munitions demand flowing from the allied war orders. (558) With respect to the very sharp increase in price late in 1916 and early in 1917 our official record carries the words "coal shortage". With respect to the plateau of

lower prices from early 1917 to early 1919 our official record carries the caption "government price control". With respect to the drop in prices in late 1919 and early 1920 the official record carries the words "government price control". With respect to the increase in the latter part of 1925 and early 1926 the record bears the caption "anthracite miners on strike". With respect to the beginning of the increase in price in the fall of 1926 the record bears the caption "non union wages advanced". With respect to the very slight peak in price in the latter part of 1927 the record bears the caption "suspension ends in the West". With respect to the slight increase in March, 1928, the record bears the caption "renewed suspension in West". With respect to the decline in prices in 1930 the record bears the caption "Prolonged business depression". (559) [There [fol. 397] was offered and received in evidence as Defendants' Exhibit No. 20 a statement of quantity and cost of fuel purchased by Class I steam roads in calendar years 1920 and 1919.]

The vast bulk of the available total tonnage of bituminous coal of the United States lies west of the Rocky Mountains. (560) By very broad areas, the grand total of 3,565,000,000,000 tons is apportioned by the Geological Survey as follows: 500,000,000,000 lie in the eastern province (the Appalachian coal fields from Pennsylvania south to Alabama), 526,000,000,000 lie in the interior province (Illinois, Indiana and the tier of states from Iowa south into northern Texas), 23,000,000,000 tons is low grade lignite in the Gulf province (around the Gulf of Mexico, in and through Texas, up through Louisiana, Arkansas and Mississippi), 1,294,000,000,000 lie in the northern great plains province from North Dakota west into Montana, including parts of certain other Rocky Mountain states), the great bulk of that being lignite and sub-bituminous coal, 1,066,000,000,000 lie in the Rocky Mountain province again largely low grade coal, and 64,000,000,000 are found in the State of Washington, with trifling amounts from other Pacific Coast states.

(561) As I understand the Bituminous Coal Conservation Act, the schedules of minimum price are to be so adjusted that the yield on all grades of coal sold for a given minimum price area shall not be less than the average cost of production curve defined in the Act, for that minimum-price

area. The minimum price is to be not less than the average cost.

[fol. 398] (1533) FREDERICK G. TRYON, heretofore called as a witness on behalf of the defendants, was recalled and testified as follows:

Direct examination.

By Mr. Critchlow:

When I testified previously on cross-examination that the strike of 1927 had little effect on the total supply of that year, I understood the point of the question to relate to the national total supply, and I gave the answer that the production of that year was practically identical with the consumption and that there was a very slight increase in prices and that there was no recorded instance that reached my attention of anybody who physically had to go without coal in that year. That was referring simply to the national total output as against the national total consumption. There were very large shifts in sources of shipments in that year. The strike affected about 169,000 men in some eight states, and it lasted (1534) in many of those states something like seven months. In Illinois the output before the strike was running about 10,000,000 tons a month. The first month of the strike it had dropped to almost nothing, and individual railroads serving the States that were affected by the strike, such as the Chicago, Milwaukee & St. Paul, were loading 23,000 cars in the month before the strike, and dropped to approximately 2,900 cars during the strike. Taking the states that were chiefly affected by the [fol. 399] strike, Illinois, Indiana, and Ohio, the drop in their tonnage during the period the strike was in effect, something like seven months, was about 78%, as I recall it, in Illinois, and somewhat less in the other two states. At the same time, the non-union areas to the south, which were continuing at work, increased their tonnage, the State of Kentucky increasing about 20% during these same months. Very roughly, there was a transfer of tonnage from the states of the suspension to the south of approximately 15,000,000 tons. Consumers got through the strike without any acute shortage—partly because of the mines which re-

mained in operation, and very largely by laying in huge stocks of coal in advance of the suspension. It was known that the Jacksonville wage agreement would terminate on a certain date, and consumers anticipated that there might be a suspension and laid in about 75,000,000 tons of coal in storage, which was probably 40,000,000 tons more than would be required at that season of the year. (1535) If you take the extra stock, 40,000,000, and reckon the delivered cost at $5 a ton, that represents working capital tied up in extra stocks of something like $200,000,000, and with capital charges on that during the period the stocks had to be held, and the cost of laying the coal down and reclaiming it, which I presume would reach easily 50¢ a ton, the total cost to the consumers of putting in the stock would be approximately $20,000,000. About half of it was accumulated [fol. 400] during 1926 and about half in the first quarter of 1927. As I recall it, on May 1, 1926 there were about 39,000,000 tons in storage and by January 1, 1927 they had increased to 55,000,000, and on the day of the strike were 75,000,000 tons. That makes approximately 15,000,000 added to storage in 1926 and 20,000,000 tons in 1927. The purchase of this amount in 1926 was one of the major contributing factors to the increase in spot price of that year. (1536) The primary inciting effect being the British strike, and the accumulation of these extra stocks being an important additional factor, without which the observed explosion in price would not have happened. The excess stocks were not all used up during the strike. It was two years before they were used up, and they continued to hang over the market throughout this time. After the consumer had laid in this huge reserve he naturally had to use it before re-entering the market to buy in the usual volume. We have long since learned that the existence of unusually large stocks in the hands of consumers has a very depressing effect on prices. The major effect has been to increase the demand for coal in the period before the suspension takes place; to require carriers to have facilities sufficient to handle these very sharp—I think they might reasonably be described as violent—peaks of demand in anticipation of the suspension, and consequently to depress the use of the carriers' equipment and mine capacity during the period when the production falls off. As I have said, they add to the [fol. 401] cost of coal to the consumer, (1537) and when not

liquidated have a very depressing effect on the price and tend to react on the man who wants to sell coal.

These shifts have an effect on the capacity of the mines. I think the record is very clear that a suspension of the kind that took place in 1927 and the similar ones that occurred in the years before the war, 1906, 1908, 1910, and 1912, not to mention the great strikes of 1919 and 1922, have all been among the significant causes of the increase in capacity. Orders were diverted to new channels, new mines were opened, and a certain illusory anticipation of prosperity suffused the industry. Ill-advised investments were made and this added to the other factors I have enumerated tended to create the great surplus capacity.

With respect to my previous testimony on cross-examination that there would be no effect on interstate commerce if a union miner from Illinois should change places with a non-union miner in West Virginia, if it is assumed that all mines in West Virginia should pay the Illinois rate of $5 (1538) under some sort of collective wage agreement and mines in Illinois were to pay the West Virginia rate of $3.25, which rates were in existence in February, 1933, and if it be further assumed that other states roundabout continue to pay the existing wage rates they were paying at that time, which would be a very fanciful sort of assumption, the situation being that the State of West Virginia [fol. 402] would be attempting to maintain by collective wage agreement, a wage scale of $5 a day, when it was surrounded by competitors who were all paying very much less than that (something like $3.50 in Pennsylvania, $3.10 in Kentucky, $2.66 in Tennessee, and lower rates in Virginia), under those conditions I think the effect on the State of West Virginia's coal tonnage would be catastrophic. The great bulk of its business is interstate, the coal moves to all points of the compass. The bulk of it moves to the area north of the Ohio and Potomac Rivers. It moves against freight differentials of an amount sufficient to impose a definite handicap on the southern shipper competing in the northern market. (1539) I should think if West Virginia were tied to a rate of $5 a day and its competitors roundabout were paying the rates prescribed, especially if they were free to lower those rates under the non-union conditions then prevailing, the overwhelming part of the State's business would disappear. The low-volatile coals leaving

the southern fields for tidewater would all be competing with low-volatile coals from Pennsylvania in the same markets, produced at a very much lower wage scale. The low-volatile coals moving westbound, which Indiana and Illinois could not replace in terms of quality, could be supplied by the Northern producers of low-volatile coal under [fol. 403] such a wage differential. I should think the one rather early effect would be to greatly cripple the Chesapeake & Ohio and Norfolk & Western Railroad systems, and to throw them into bankruptcy, since the greater part of their revenues is derived from the carriage of coal originating in that State. At the same time, these railroads would be expanding their capacity in the surrounding fields. The competing states would be greatly adding to their business, receiving what West Virginia was losing, and then, if you look off to what would be happening in Illinois, dropping its wage rate down to $3.25 a day, it would be able to undercut its neighbors, especially Iowa and Indiana, and again there would be a huge increase in tonnage.

(1540) Cross examination.

By Mr. Whitney:

The figures in my statement in "Coal in 1930", page 620 that on calculated capacity in millions of net tons at 308 days the capacity in 1927 was 835, in 1928 was 760, and in 1929 was 752, are accurate and do not conflict, if I may be allowed to say so, with the statement I thought I was making in my prior testimony about the strike of 1927 resulting in increased capacity. If I understand Mr. Critchlow's question, it was not relating to the suspension of 1927 alone, but to the effect of such suspension in general upon capacity. The suspension of 1927 did have the effect of temporarily increasing capacity in the South. A few [fol. 404] more thousand men were drawn from the hills and put to work at coal mines. The total capacity of the South increased somewhat during that year. It was, however, less, even in 1927, than it had been in the peak year 1923. Both North and South were forced to shut down many mines after 1923 and to close out large amounts of mine capacity. The reduction in capacity, however, was much greater in the North than it was in the South. There was a slight net increase in the southern fields in the year

1927. (1541) But taking the United States as a whole, the national total for all districts is a decrease of 75,000,000 tons of calculated capacity.

[Mr. Whitney then made Mr. Tryon his witness.]

A table entitled "Sources of Coal Used for Railroad Fuel, 1929" was prepared by me and my associate, Dr. Young, as one of the publications of the Bureau of Mines. (1542) [The table was offered and received in evidence as Plaintiff's Exhibit No. 67, with the explanation by Mr. Whitney that it was offered particularly for the fact that on page 2 there is a table giving railroad-fuel coal on which freight was paid, and on which no freight was paid, by mining districts, 1929, in net tons, showing bituminous coal sold to railroads on which freight was paid to be 30.9% and that on which no freight was paid to be 69.1%.] This table is based on returns from fuel agents of all the large railroads, [fol. 405] all Class I railroads, and each fuel agent was asked to estimate what part of the total tonnage that he purchased was so-called non-revenue company fuel, and what part was purchased off-line. It works out that of the bituminous coal bought by the Class I railroads, 69.1% was coal originating on their own lines on which they did not have to pay freight to another carrier, and 30.9% was coal originating on foreign roads for which they had to pay freight to that other road. (1543) That coal in respect of which no freight is paid is coal of which the carrier takes possession in its railroad cars and hauls those railroad cars to a convenient storage point. The carrier supplies its own cars for the loading of its own railroad fuel. A very small part is taken directly into locomotive tenders at the tipple. 99% of it must be loaded in railroad cars and moved by the carrier some distance, often across a State line, to the point where it stores its coal. It might often happen that the car in which the coal is taken belongs to some other railroad which happened to be on the lines. (1544) But the coal upon which no freight is paid is carried by the railroad that purchases it.

Increase in price influences an operator's decision to stay in business or go out of business only as it is reflected in [fol. 406] his profits. If prices go up more than costs, and an operator gets an increased profit spread, the incentive would be present to expand. An increase, in itself, will

not necessarily give the incentive to contract, nor will it presumably give the incentive to contract. It depends upon whether costs increase in greater ratio or not. (1545) By profit I mean excess of average sales realization over average cost. In cost I include all elements in cost of production, including depreciation, and selling expense related to the mine. I believe that it is true that a great number of mines operate habitually over the years at below total cost, allowing for depletion, depreciation, and other capital charges, because they operate at a net cash return.

By the Court:

It was certainly true, down to and including 1923, that a great deal of the growth of the coal mining business in West Virginia has been due entirely to natural causes and not dependent on the freight rates or the wage rates. During the years from the early pre-war period up to about that date, there was a very rapid growth of mine capacity in the South, and it was associated in large measure with the opening up of new fields. The railroad net had not been completed in that part of the country. The Louisville & [fol. 407] Nashville Railroad (1546) was sending out important tap lines that penetrated new valleys in the mountains. The Chesapeake & Ohio was expanding, and also the Norfolk & Western. So in 1905 you have the spectacle of the whole Logan field beginning to open up for the first time. In 1912 and 1913 the Harlan field in eastern Kentucky, and the Hazard field in the same area began to produce. The Winding Gulf district in Virginia was opened up about 1907. From those years on until 1923 there was a very rapid growth in capacity in the south. It was growing by leaps and bounds, and largely the process of development of resources that had been before untapped, encouraged by the munitions demand and high prices during the war. After 1923 that growth stopped. There were new mines opened up in the South; there were expansions in capacity and existing mines, but in the South as in the North, the net change after the year 1923 was a decrease in capacity. It was a slight decrease in comparison with the very high mortality that went on in the North, but in the South, too, the picture is one of declining mines in the aggregate and declining capacity. The great increase in business which the South, as an area, attained after 1923,

more or less at the expense of the North, was obtained by working the capacity in existence more days per year.

[fol. 408] (562) CHARLES O'NEILL, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Critchlow:

I have worked in the mines and been associated with the coal industry in various connections for something over 35 years. As a boy and young man I worked in the mines as a coal miner. I was an officer of the United Mine Workers of America in the central Pennsylvania district. I was secretary of the Central Pennsylvania Coal Producers' Association for 10 years. Since January 1, 1930, I have been vice-president of Peale, Peacock & Kerr, Incorporated, miners and shippers of bituminous coal produced in Cambria, Indiana, and Clearfield County, Pennsylvania. (563) Until February of this year I was engaged in marketing and selling coal produced by the company. Since that time I have been attending wage conferences and have been in Washington, and have not been active in selling coal this year. I am president of the Eastern Bituminous Coal Association, a voluntary association of producers operating mines in 14 counties in central Pennsylvania and Maryland and in Grant, Mineral and Tucker Counties of northern West Virginia. Last year there were about 205 members with a production of 27,000,000 tons. The mines in the area covered by the association produced 37,800,000 tons.

[fol. 409] (564) I am familiar with the marketing of coals in the northeastern part of the United States particularly. The coal produced by the members of the Eastern Bituminous Coal Association is marketed principally in the Middle Atlantic States—Pennsylvania, New York, New Jersey, Delaware, District of Columbia, and the six New England states, at tidewater ports of Philadelphia, Baltimore and New York for trans-shipment for points beyond, in southwestern Quebec and eastern Ontario all rail, and via the Great Lakes of the northwest to points in Canada and

the United States. We also ship coal in small quantities into about 42 different states. Coal from that district competes with coal from the Ohio field, the low-volatile fields of southern West Virginia and eastern Kentucky, the fields of northern West Virginia, the western Pennsylvania high-volatile district and Indiana and Illinois, principally. My company ships about 55% of its production interstate, sells about 20% to railroads and about 20% intrastate, delivered in Pennsylvania. (565) The company does not operate mines in any other state. The coal sold in Pennsylvania competes with coal from Maryland, northern West Virginia and to some extent from Ohio.

In our district the great bulk of the coal is sold prior to delivery. Contracts for delivery from April 1 are usually made between January 1 and March 31 of that year. During that period we sell 50% to 75% of the total sales we make throughout the entire year. Deliveries are made by requisi-
[fol. 410] tion by the customers from month to month. During the rest of the year we try to dispose of the balance of the coal and accumulate orders so that we can project our work at the mine for one, two, three, four or five days in a given week. Orders and shipping instructions are sent to the mine and then the mine proceeds to operate by loading coal into cars. (566) We have never stored any coal at the mine. There are many reasons why coal cannot be stored at a mine except for unusual circumstances. Coal stored outside deteriorates in quality. There is some loss of heat value and considerable degradation, that is, breaking down into finer sizes. There is also the cost of storing coal and later placing it in railroad cars. The value of coal when stored for any period of time is less than that of fresh mined coal. It would be with the knowledge of course that when you loaded it it would be less valuable than fresh mined coal, and you would have additional cost in the lowered quality of the coal that you shipped to your customers. So that the practice of storing coal at mines, for many practical reasons, is not good. As I have said, except in very, very exceptional cases, and in very infinitesimal quantities, compared to the total amount produced and shipped.

There are differences in marketability and salability in the case of all sizes and grades and kinds of coal. (567) Normally in the summer season it is harder to dispose of larger sizes than finer sizes which are used by industrial

consumers, whereas in the winter time when people are buying household or domestic coal there is greater demand for the larger sizes. The low-volatile coals of central Pennsylvania of the finer sizes are usually of lower ash content and higher heat value, because there are no laminations of dirt or ash to hold them together in larger pieces. In the lower volatile areas of our district, the smaller sizes are preferred by industrial consumers in some instances to [fol. 411] mine-run and to large prepared sizes. That varies with different seams in different localities. In some localities the reverse is true.

The most important factors which determine the coal producer's competitive position in any particular market are cost of production at the mine plus cost of transportation to destination.

(568) Between 60% and 65% of the cost of production is made up of labor cost. In our district, under the wage scale preceding the one now in effect, it was 61% and with the increase in wages granted October 1 of this year, amounting roughly to 15¢ a ton, that percentage will increase approximately to 63%.

The central competitive field, as constituted for wage making purposes, includes the States of Ohio, Indiana, Illinois and the western district of Pennsylvania. In the central competitive field prior to March 31, 1927, and for a continuous period back as far as 1898, wages were fixed by the establishment of a basic wage agreement as the result of a conference of miners and operators from Ohio, Indiana and western Pennsylvania. (569) Prior to the war period, the proportion of all coal produced in the United States which was produced in the central competitive field varied from 40% to 46%. This constituted about 70% of the coal that was produced at unionized mines.

(570) [It was then stipulated by Mr. Whitney that the [fol. 412] traditional way in the industry in the central competitive field of fixing wages and hours is by collective bargaining in an interstate conference between associations of producers on the one hand and representatives of the men on the other, and that the other union areas, outside of the central competitive field, fix their wages and hours by collective bargaining on the basis of the agreements made in the central competitive field.]

Up to 1922 the central competitive field wage scales as applied to the mines within it and to the outlying unionized districts have had a direct influence upon wages in the non-union mines. (571) This effect was in proportion to the closeness of location of the non-union mines, to the unionized area. During the war and the post-war period, due to high prices, car shortages, the shopmen's strike, etc., in order to retain labor at the non-union mines wages in the non-union mines were placed upon substantially the same level as those paid in union mines. This was up to January 1, 1923.

The theory of wage agreements by interstate negotiations rather than by local negotiations was to maintain a proper competitive relationship between producers by establishing proper wage relationships over a large area directly and also indirectly upon areas outside. (572) The basic wage agreement was simply an agreement upon certain basic rates for piece workers and certain basic rates for day wage workers to which all other rates in and around the mines could be keyed and made relatively uniform. Each district made its own agreement on the [fol. 413] basis of the rates and conditions of labor in the basic agreement. The basic agreement covers hours as well as wages and other conditions of employment. On January 1, 1923, the basic wage rate in the central competitive field for the track layer was $7.50 for 8 hours.

(574) We call the trackmen's rate the basic rate or key rate for day labor and the cutting and loading rates the base rates for piece workers.

Wages are highly important in determining competitive relations. It is important to know what your competitor is going to pay. You have to know what your competitor is going to pay if you are going to have any idea of what your competitive circumstances will be in any market. The fact of the matter is, what you pay is what your competitor is willing to pay even more than what you are willing to pay, yourself, because there are more of them. (575) I cannot say specifically what the wage rates were in the non-union fields on January 1, 1923. The wage scale in the union fields was extended for a period of 3 years from April 1, 1924 to March 31, 1927 by the so-called Jacksonville agreement. Abnormal conditions as to prices and production being fully developed in 1923, wages in the

non-union fields then immediately began to be reduced to approximately the war-time scale, which was in the case of the tracklayer, $5 in the north and I think $4.78 in the New River district and the Smokeless field. After the agreement at Jacksonville was signed the non-union fields, beginning with the New River field, reduced their rates from the $7.50 relationship to the $5 relationship and the union fields had to continue to operate on the $7.50 basis. That was the widest disparity between wage rates that I ever knew to exist between the unionized mines and the [fol. 414] non-unionized mines.

(576) At that time there were some non-union operations in Pennsylvania. They were not of sufficient importance to be a dominating influence in wages or hours except when conditions got very bad. In the south there were some union mines in Kanawha district of southern West Virginia and I think a little in eastern Kentuck Generally, non-union conditions obtained in the mi south of the Potomac and Ohio Rivers and unionized conditions obtained in the mines north of the Ohio and Potomac Rivers.

(580) In argument over an objection to a question propounded to the witness, Mr. Whitney made the following statement:

"It is alleged in the affirmative defense of the Government defendants: * * *

Thirdly, that there have been unfair trade practices. We make no point of the third. Let us have that right out of the case. The Federal Trade Commission has regulated it."

(590) During the same argument the following colloquy took place:

"My Critchlow: The provisions of the Act are in three parts. I understand from Mr. Whitney that no contention is made that that part of the Act which provides for fair trade practices is unconstitutional. Is that correct?

Mr. Whitney: Except as a part of an entirely unconstitutional statute. It is inseparable.

Mr. Critchlow: Your contention there is that it is not separable?

Mr. Whitney: Yes.

Mr. Critchlow: You have the code divided into these three parts:

One relating to fair trade practice provisions. I understand Mr. Whitney now to admit that if that is separable, then the statute, to that extent, is constitutional.''

(609) The original wage and hour agreement in the central competitive field was entered into April 1, 1916 to continue until March 31, 1918. During that period, because of a rise in cost of living and increased prices due to the war, it was modified twice, on April 1, 1917 and on November 1, 1917. The latter was pursuant to an agreement by the Fuel Administrator to grant an increase in the selling price, maximum prices then having been established under the Lever Act. The Fuel Administrator agreed to grant an increase in the selling price, equivalent to whatever increase in wages the miners and operators of the central competitive field would agree was proper. The agreement, known as the Garfield agreement, was on the basis of $5 for the tracklayer and other rates in proportion and the Administrator granted an increase in the selling price of 45¢ a ton to cover the cost of this wage increase. That agreement was made to extend for the duration of the war but not beyond March 31, 1920. The Armistice was signed on November 11, 1918, and there was a decrease in the demand for coal and some drop in prices following elimination of the maximum price established by the Fuel [fol. 415] Administrator about February 1, 1919. (610) During the period from February until September the United Mine Workers asked for a further increase in wages due to the rise in the cost of living which the operators refused because they contended that their agreement extended until March 31, 1920. The United Mine Workers then declared a strike on November 1, 1919 and closed down the union operations of the county. That strike lasted until December 10, 1919, during which period available supplies of coal were used up, the non-union operations not being sufficient to maintain the country, it being in the winter time, and the Fuel Administration was reestablished by presidential order, maximum prices being reestablished from December 1, 1919 to April 1, 1920. A temporary settlement was effected on the basis of a 14% increase based upon the increase in the cost of living. The

President intervened and appointed a bituminous coal commission to conduct an investigation into the causes of the strike and recommend an award to the miners and operators. (611) That Commission was appointed in the latter part of December, 1919, and it held hearings and conducted investigations in 1920, finally making an award effective April 1, 1920 of an average of about a 27% increase to the mine workers, making the tracklayer's rate $6 per day. It recommended that the maximum prices of the Fuel Administration be discontinued on April 1. The miners and operators in the central competitive field confirmed the award effective November 1, 1920. That agreement was supposed to run until March 31, 1922. Following its adoption, prices began to rise very rapidly, the switch- [fol. 416] men's strike affected the coal car supply, the post-war boom of 1920 began, and the day wage workers in certain areas contended that they had not received proportionately as great an advance as had been accorded the piece workers by the Commission's award. During July and August of that year, when selling prices of coal were at their highest point from $15 to $20 a ton, for spot sales, there was a series of outlaw or wildcat strikes in Illinois and Indiana by the day wage workers with the result that President Wilson agreed to reassemble the central competitive field joint conference. (612) That conference assembled and failed to reach an agreement as to the amount that day wage workers should receive although there was an agreement that there ought to be an increase. The Illinois operators then granted their day wage workers an increase of $1.50 per day which brought the scale to $7.50 a day, and that was immediately signed by all the districts in the country. That rate was carried up to March 31, 1922. The agreement provided that the mine workers and operators would assemble for a joint conference at its expiration. The operators of the western Pennsylvania district refused to attend the joint conference and the mine workers called a strike on April 1, 1922, and there was a general shutdown of unionized mines. The strike lasted from April 1 until about August 19 at which date an agreement was effected by certain operators from various states. President Harding had tried to get the conference [fol. 417] together to bring about a settlement but was unable to accomplish that. (613) A group of companies

from various states, including western Pennsylvania, Illinois, Indiana and some from the southwest, Kansas and Missouri, signed the agreement renewing the 1920 agreement until April 1, 1923 on the same basis. On April 1, 1923 the central competitive field renewed the agreement further to April 1, 1924 at the same wage rate and day basis.

1923 was a good year as to production. I think it was 565,000,000 tons for the country. It was effective as to both production and prices because the long strike in 1922 meant that stocks had been used up. In addition, the coal car shortage had affected many carriers in the latter part of 1922 and the early part of 1923, with the result that prices due to the strike and its effect on them, and the coal car shortage, were on a rather high base from the end of the strike to April 1, 1923. Most of the coal that was sold for delivery after April 1 over the ensuing 12 months was contracted for at relatively high prices. Although prices declined from April 1 throughout the year there was a good volume of general business.

(614) Toward the end of 1922 the effect of the excess capacity was beginning to show itself on prices and in competition. The coal car shortages had ceased to exist and we have never had one in our country since.

The next wage agreement was made in the first quarter of 1924 and was effective from April 1, 1924 to March 31, 1927 on the same basis of $7.50 per day. Wage rates in the Southern fields were reduced to the Garfield agreement base which may have been $4.68 in certain fields and $4.78 in others. (615) The wide disparity of wages between the union and non-union fields enabled producers [fol. 418] on the lower level of wages to take markets away from the producers who were tied up on the $7.50 per day wage rate level. From 1924 to 1927 business was lost by mines in Pennsylvania, Ohio, Indiana and Illinois by millions of tons and the relative increases in the south, particularly in the mines in West Virginia and Kentucky, were greater during that period than at any other time. It closed down mines operating in the unionized area. In the central Pennsylvania district the number of mines in operation was reduced from 1,022 to 357 in 1933, a production decline from 54,000,000 tons to 28,000,000 tons. (616)

The continuous decline in prices meant losses, and confusion increased year after year in our district until about July 1, 1933. Well, as the pressure of competition increased losses due to the fact that we had to sell at prices greatly below cost of production, became greater. Northern operators abrogated their contract with the union and opened up on a non-union basis and established wage scales at whatever level they could. Usually they tried to go to a $5 basis which was a reduction of $2.50 per day. Strikes began in all the union districts of the north about 1925. As one company went non-union, others were compelled to go non-union and finally whole districts went non-union. We carried out our contract with the union and continued the wages for three months of 1927. We attempted to get the union to give us a reduction so that we could compete with the non-union rates but they refused and on August 17, 1927 we opened up our mines on a non-union basis.

Practically everybody in the district who had remained union did the same and established a $6 a day wage rate. [fo. 419] (617) We had a big strike and finally got the mines open and operating on a non-union basis about the first of 1928.

The central competitive field was unable to enter into any agreement in 1927 at the expiration of the Jacksonville agreement. Between 1925 and 1927 the western Pennsylvania district had gone non-union. The Ohio district which had remained union refused to renew the agreement on that basis and withdrew from the central competitive field and went on strike and declared their mines open shop. We likewise in the central Pennsylvania field did the same thing a little later. The conclusion of it was that the mines in Pennsylvania and Ohio were all non-union by 1928 except in a very few instances. Illinois and Indiana were practically all that remained in the union in the north. From 1927 to 1933 wages were established more or less arbitrarily by the operators, sometimes in groups through associations and sometimes just by the individual operators and the longer that policy continued the worse it became. We cut our wages to $6 in 1927 and on June 16, 1929 to $5 in the central Pennsylvania district. On November 16, 1931 we cut to $4.40 a day. (618) On April 16, 1932 we cut to $4 a day and on December 6, 1932 we cut to $3.44 a day. Then we quit. We figured that was about as far

as we could go. And that was really the highest wage paid by a group of representative operators in our district. Wage cutting had become so prevalent in the industry that it was very difficult for anyone to know exactly what any other operator was paying. It had become a matter of the individual slashing of prices and then the individual slashing of wages in order to meet the prices and to try to keep in business. The confusion and chaos that the industry [fol. 420] was in in 1933 is reflected in the fact that the average realization for our company was $1.21 a ton.

We have figures more representative as to what the district and other companies were doing. (619) When we were negotiating with the NRA in 1933 for our district we assembled the cost and realization for 68 representative mines. They showed a realization of $1.14 and a cost of $1.44, a loss on cost of production against average realization of 30¢ a ton during that month.

We made the wage cuts I have mentioned to try to meet the competitive circumstances of the market. We made out cut on December 16—no, on November 16, 1931, in anticipation of the prices we would probably have to quote in order to sell our coal in the contracting period from January 1st to March 31, 1932. The trouble with it was that you made wage cuts at stated intervals, and your prices were continually going down, and after you cut your wages, your prices kept on descending. You never could keep up with them, so that every so often you probably reduced your losses by again taking it out of the only place you could get it, which was by cutting wages. That was why we had to do it, in order to try to stay in business. Of course, wage cutting became absolutely prevalent in the industry. Everybody was cutting prices and wages, and prices and wages were made according to the competitive conditions. (620) That condition existed from 1927 until July 13, 1933. It started in 1925 in the unionized fields and was a continuous operation from that time forward.

We continued operating our mines because we had a large investment. It is a costly matter to let a colliery stand idle. There are taxes and fixed charges and maintenance men and organization. In our district it would cost 20¢ to 30¢ a ton of annual capacity to let the mine stand idle and take care of it properly. That is the pressure that is back of an operator to try to operate his mine

to accumulate enough tonnage in order to reduce those losses.

(621) During the depression in our district we were on about three to three and a half days a week. The aver- [fol. 421] age for the field was three and a half days, 157 days for the year 1932, while the record for 1933 was about 170 days. In 1928 it was around 200 days. This is on the basis of a full year of 300 days.

Figures for our district show that a mine working three days as compared with the same mine working five days a week means a difference in cost of about 16¢ a ton in favor of the five day week. That is what forces you to try to get tonnage at a price so that you will have backlog tonnage, that is, the proportion sold to industrial plants or for delivery over a long period of time. After you get that your incentive is to cut cost of production, to add to that tonnage as much as you can in order to get a greater degree of operating time and reduce the expense due to idle time. That is a constant depressant on the market because you always have a surplus of offers in the market at continually declining prices.

(622) We cut our wages on December 16, 1932, in our district in anticipation of selling our coal in the usual contract period. The Interborough Rapid Transit Company in New York City is a very large consumer of coal, purchasing over 1,000,000 tons annually. That company, under the direction of the New York Transit Commission, makes contracts after public opening of bids. This occurred in 1932 about March 15 and the awards were granted on March 29. The next day one of the large suppliers of that company, who had received a generous portion of those 1,000,000 tons, cut his wages effective March [fol. 422] 30. The effect of that award and wage reduction, which was public, affected prices for public utilities all along the Atlantic Coast. The rest of us who were doing business in that district had to immediately cut our wages in order to revise our prices and meet the competition.

We had substantial losses in the period 1929-1933. In 1934 we broke even.

Under the Bituminous Coal Code of the National Recovery Administration our position was materially improved from a financial standpoint. (623) We wiped out our losses and had substantial increase in wages for the mine workers and

in general a much better situation, particularly during the year 1934. The Code regulated prices and wages. I am not so familiar with the industry as a whole except as to Division No. I, which included the mines in Pennsylvania, Ohio, West Virginia, Virginia, eastern Kentucky and Tennessee, and about 70% of the production of the nation, employing approximately 325,000 men. In that area, the operation of the Code changed the situation from one of constantly recurring losses to a very slight margin of profit in 1934, with a benefit to operators and miners and reasonable prices to consumers.

(624) I was chairman of the eastern subdivision of the Code Authority of Division No. 1 under the Code. (625) There was a provision in the Code requiring the filing of certain information. By an amendment in 1935 producers were required to file invoices, contracts, credit memoranda and other information necessary to the compiling of prices [fol. 423] and practices under the Code.

(627) [A copy of the NRA Code for the Bituminous Coal Industry was then offered and received in evidence as Plaintiff's Exhibit No. 59.]

During 1933, when wages had reached these very low levels, both in the north and the south, produced by this terrific price war which had been continuing, the National Industrial Recovery Act was enacted by the Congress. The mine workers and operators were assembled by the Administrator of that Act and there was worked out what came to be known as the Appalachian wage agreement. (628) The Code and the wage agreement were made effective on October 2, 1933. That agreement ran until April 1, 1934 and covered the States of Pennsylvania, Ohio, West Virginia, Virginia, eastern Kentucky and northeastern Tennessee. Because of the great volume of tonnage and number of men directly affected by it the Appalachian agreement was made the basic agreement and there were some 23 district agreements made under it. It also is the basic agreement for the wage schedules in all union districts in the United States which now, I think, cover about 95% of the total miners employed. That agreement was extended on April 1, 1934 for a year with a wage increase and a change from an 8 hour day to a 7 hour day. At the expiration of

that agreement a joint conference met on February 18, 1935 and failed to reach an agreement. On April 1 the National Recovery Administration had the agreement extended until June 16. (629) Later the President intervened and had it extended until July 1 and there were two or three other [fol. 424] extensions brought about by government intervention and an agreement was finally consummated after a five day strike in September, which was made effective October 1 of this year, with an increase in wages of 9c a ton and 50c a day on day wage workers, that agreement to extend to March 31, 1937. [Copies of the Appalachian and Smokeless agreements, dated October 1, 1935, was offered and received in evidence as Defendants' Exhibit No. 21.] (630) Producers of more than two-thirds of the national tonnage for 1934 are signatories to the Appalachian agreement. In 1934 the Appalachian area produced about 251,000,000 tons while the entire country's production was 358,000,000.

The only wage agreement executed under the Appalachian agreement in a district outside the Appalachian area of which I know absolutely of my own personal knowledge is Illinois. I have a general understanding that they have been generally closed all over the country on the same basis. The United Mine Workers of America have approximately 300,000 men in the union in the Appalachian area out of some 400,000 or 450,000 men.

(631) [A copy of the Smokeless wage agreement, dated October 1, 1935 was marked Defendants' Exhibit No. 22 for identification and was withdrawn.]

In eastern Pennsylvania most of the mining towns are isolated. That is, they are built near the location of the mine, which is usually located in a field. Such industries [fol. 425] as there are around the mining towns are usually dependent upon the mine itself. (632) That is also true of local businesses. In Johnstown, Pennsylvania, and around Pittsburgh, there are many mines located near big centers where there are many other industries. Generally speaking most mines are isolated. In my judgment a price schedule based upon the weighted average cost of producing coal in minimum price area No. 1 would have the effect of placing that schedule of prices at a realization at or about 65% on the cost bulk line—(633) in other words, 35% of the

mines in my district would produce coal above the weighted average cost of the district and 65% would produce coal at or below that cost. It is my thought that that price provision would have the tendency to concentrate the business in the efficiently managed, well-operated mines and to do it in an orderly fashion, with the tendency to reduce cost at a given wage scale, rather than to have the disorder and chaos we have without any controls.

(634) Cross-examination.

By Mr. Whitney:

It is hard to tell what the exact level of prices is today in any district. It is my judgment that the Act would not increase prices substantially above the NRA code levels. I think the current prices will be raised some in my district and more in some others.

I do not know why an increase in price should have any effect on the number of mines if it is effective at all collieries and to the same extent. (635) If prices were raised more [fol. 426] at one mine than another it might affect the operation or closing down of those mines. It is my judgment that a general increase in the present price level will make no change in the number of mines in my district. It depends on the relation to profit. If there is a profitable margin, it will increase the number of mines or open up mines that have been temporarily closed down. If prices are fixed on a basis of average cost I cannot see why it would open up any more mines.

The increase in price will affect the profit of only those operators that can produce coal below the average weighted cost. (636) I know of nothing in the statute that contemplates an increase in prices as such. There is no direction in the statute to increase prices. In my district current prices are now probably 15 or 20c a ton below average cost.

Assuming that the statute will provide an increase in prices (637) its effect on a particular mine selling below cost if it had to make a very large increase in prices would affect that mine adversely, perhaps, from a competitive standpoint. If all the factors entering into the sale of coal such as quality, etc., are known, it might have the effect of closing down a mine of that kind. If the average price in our district is raised to average cost and the average prices of all

our competitors are raised to average cost it will not make a change in a single mine's position in our district. (638) If we raise prices and nobody else does it will shut mines in our district, but if the provisions of the Act are carried out and everybody goes to the same level it will make no difference. (639) If prices throughout the country are raised [fol. 427] to profitable levels it will increase the number of mines in my district.

My company screens about 30% to 40% of its coal. When we make sized coal it is very difficult to keep in proper balance the relationship of various sizes in all months of the year. The prepared sizes would go to the householder and they are a drug on the market in the summer time.

I mean by proper wage relationship the relationship of one rate to another rate within a given mine, that is, (640) as to a skilled inside laborer as compared with his helper, for instance. I also took into account in piece work rates, such differences in physical conditions over a broad territory as will give relatively uniform wage schedules and a relatively uniform possibility of earnings between mines within a district, between districts and between states. Some of them are recognized as differentials, some merely differences.

When I testified in 1926 at hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives that—

"The tonnage of non-union fields is naturally expanding, and tonnage produced by operators doing business with the United Mine Workers of America is contracting. The Government cannot cure this. These two ideas will continue their contest for domination in the industry. The thing that the nation needs is a restoration of the status in the mining industry preceding the War. This can be, and will be, brought about by the men in the industry within a very short time. In my opinion, the best that Congress can do to help this thing along is to leave the matter alone."

[fol. 428] I meant just what I said, but between 1926 and 1933 I changed my mind and found out that we could not be left alone and live, without destroying the industry. I do not mean that the coal will be destroyed but that the business of mining and shipping coal will be destroyed by destructive price cutting. (641) I can visualize insufficient coal being

shipped to take care of the requirements of the consumers if the industry were carried on as in 1933. I think that destructive price cutting can only result in shutting down the mines or absolute monopoly by securing control of the entire industry by those strong enough to remain in the business. I do not know the exact number there are but I suppose there are several thousand companies now engaged in the industry. The ones I fear will acquire monopolistic control are those who can last through the fight. I have no fear of any of them that I know of particularly. I am talking about the results of destructive price cutting.

In my district, 80% have joined the Code voluntarily and Indiana had something over 90% and Illinois 96%. I think it is true that everyone who has joined the Code has joined "voluntarily."

(643) When I testified before the House of Representatives last spring, I felt that there were many men who had engaged in a conspiracy to destroy the NRA code and I anticipated that without enforceability in the Act, such would be the result of any legislation that might be passed by the Congress—that these same men who had destroyed the code by destructive price cutting and unfair trade practices would strike down the Act if there were no provision that would make them comply with the Act when they had signed it. I felt that there should be a provision to make [fol. 429] them obey the Code after they had signed it and that it should be severe enough to make those kind of people respect the law. (644) My judgment is that the producers who attended the meeting in District No. 1 were there voluntarily and signed voluntarily, without the compulsion of the provisions in the Act.

(650) With respect to the testimony I gave before the House Committee on Interstate and Foreign Commerce in 1926 as set forth above, the reasons that caused me to change my mind subsequently are as follows: The mines in the non-union areas did continue to expand their production, or increase their proportion of the country's production, and non-unionism became the dominant idea in the industry during the period from 1924 to 1928. But after it had won out, instead of settling the problems of the industry in restoring the normal condition of competition of operators from all states, all non-union, it resulted in complete chaos and disorder in the industry. And when I realized that, from 1926

to 1933, non-unionism being dominant in the industry, there was still disorder and chaos, bankruptcy and strikes, and troubles everywhere, low wages, impoverishment of miners, bankruptcy of coal companies; and with no end to that situation, I decided that probably the industry needed something else to help it get on an orderly basis. (651) The depression in the mining industry began really in late 1923. There was no period of prosperity in the industry from 1923 to date. It was always in an impoverished condition, continually getting worse. There were slight periods, affected by the anthracite strike in the United States in 1925 and the British miners' strike in 1926, when mines in the eastern portion of the United States had some increase in prices and in volume of business which put them on a better basis for these years than other parts of the industry. I do not know [fol. 430] just when I changed my mind. I came to Washington in May of 1933 to attend the meeting of the Association of Manufacturers who were seeking to amend the National Industrial Recovery Act and at that time, instead of opposing the Act, I supported it. (652) The change of mind was a gradual process. 1933 is finally when I did change my opinion as to what the outcome of our situation would be on a nation-wide basis with unrestricted competition. The gradual process began to occur from 1930 on, as I got closer to the marketing problems of the industry and had to sell coal, and realized that our prices were going down and that there was no hope of stopping them. It is fair to say that such depression as the coal industry suffered prior to the general depression was not a factor which caused me to begin to change my mind. I cannot see anything but a continued depression in the coal industry. The coal industry was low before general industry became low. General industry did not become low until 1929 and 1930. I cannot state definitely when my mind changed or by what process it changed except the condition of chaos and disorder which was in the industry and for which I saw no end, (653) which led me to the conclusion that we need some regulation. I am not so certain that my mind was on the way to a change by 1931. I began to realize more keenly the difficulties with which the industry was confronted and made some efforts during that period to try to put the industry on some basis whereby we could maintain order. I do not remember whether in 1931 I had changed my mind on that or not. In

[fol. 431] 1932 I tried to support the regional sales agency plan which came out in the Appalachian Coals case. I do not know whether I ever replied to the question in 1932 as to whether the Government could cure the situation. (654) One's opinions change as time goes on and one recognizes the full force and effect of the circumstances that bring about the change. It may be that my mind was well on the way to a change in 1932 but I cannot say. I think I reached the conclusion that the poor condition of the coal industry after 1926 and prior to the general depression did cause my mind to turn in the direction of a cure by the Government. It was a combination of all the circumstances of my experience from 1923 forward. I cannot fix the exact date. I think it was the result of the total development; the facts controlling the industry were becoming more evident every day to me. (656) I do not believe that prior to 1930 the full force and effect of conditions had brought me to a point where I could say I had changed my mind at that time. I was still living in the hope that we could work it out by and through our own efforts by voluntary action. I felt the full force and effect of it by 1932 and 1933. That is when I reached the conclusion that we were rather hopeless.

(657) I have not thought overnight of the name of any company that is likely to monopolize coal in the event the Guffey Bill is held unconstitutional. I said that I thought the end of destructive price cutting would be to give a monopoly to those who would live through it. I do not know of any company who could live through a destructive price war, such as we were engaged in in 1933. It continued from [fol. 432] 1924 to 1933, and I think we have evidences that it is recurring again, right now. In 1932 I saw the wreckage of company after company going out of business. It is self-evident that a continuation of the process would gradually eliminate any company, no matter what its strength today might be. You can destroy the liquid cash capital of a coal company but that does not necessarily liquidate the coal mine. The coal mine is still there. I think destructive price cutting is one of the weapons by which monopoly is achieved in any industry. (658) I do not think it is a new thought of mine that monopoly is likely to happen in the coal industry. Destructive price cutting may bring about monoply in any industry. I testified in April of 1932 before a committee of the Senate as follows:

"Senator Hayden: I take it from what you say, then, that there is so much coal in the United States, and the ownership is so widely diffused, that there could be no coal monopoly.

"Mr. O'Neill: Absolutely none, in my opinion. In bituminous coal none.

"Senator Hayden: Do you consider the bituminous coal industry, then, somewhat similar to the wheat-growing industry, that there are so many people engaged in it, and there is such wide opportunity to produce it, it would be impossible to produce a coal monopoly in the United States?

"Mr. O'Neill: I think absolutely. So long as coal is real estate I do not see how it could ever be possible."

(659) because I believed that at that time. I have believed both, that which I testified today and that which I testified before Senator Hayden.

[fol. 433] With respect to my testimony at the same hearing that

"Even during the current period of depression many other industries have suffered a far greater decline in the rate of operation and earnings than has the bituminous mining industry."

I do not know whether I can testify that all these other industries ought to be regulated by legislation similar to the Guffey Bill. I am not sufficiently familiar with other industries. (660) I am not prepared to testify on the subject of the steel industry. I think there is a good deal of difference between a fabricating industry and a natural resource industry. One is an exhausting industry and the other is not. Coal is a mineral that is destroyed or at least is irreplaceable when taken out. The necessity of conserving coal is one of the elements to be considered. I am not sufficiently familiar with the anthracite industry to testify as to whether it should be regulated by a bill similar to the Guffey Bill. (661) I think it needs regulation. I do not know as to the oil industry but I have many ideas that it ought to be regulated as a matter of conservation of a very valuable national resource. I think the coal industry is special and unique in the respect that it employs so much labor, that so much of its cost of production is labor or wages cost, that it has become needful to the nation and it must continue to give a national service

to the nation and to the carriers of this country in order that it and they will continue to do business. (662) I believe [fol. 434] that the bituminous coal industry is necessary and essential and that it needs regulation in order to continue in business. So far as the salt business is needful for the people, I think all businesses are needful. I do not say that all businesses should be regulated by statutes like the Guffey Coal Bill. The reason that distinguishes the coal business from other businesses is that it is an essential necessity as a national industry and one that can be regulated in no other way and cannot live in any other way. When I say "it cannot live" I can visualize that it will be destroyed so that coal will not be delivered. (663) We had a strike in 1935 that closed down practically all mines of this nation. It lasted a very short time. Its effect was not good.

With respect to whether employees are in a more distressed condition in the coal industry than any other industry, I think that is dependent upon what the selection is. I think that conditions at certain times and in certain areas are very bad. I know that to be the case today in some areas. I think they are very good in some states and they may [fol. 435] still be, but I do not know about that. I think that is a comparison of the local situation. I think there is a peculiar or sui generis distress in the coal industry that does not exist in other industries. I think when we force wages down to $10 a week we have produced a condition that is not healthy. (664) I think the time the wages were the lowest in the coal industry was in April and May 1933. They were lower on the average then than they had been in 1932. On April 16, 1932 our wage rates were $4 and in 1933 they were $3.40. I believe that production as to quantity in the industry was about the same in April, 1933 as in April, 1932. It may have been a little more in 1933. There was greater production for 1933 for the year as a whole than in 1932, and wages were substantially increased in 1933. (665) They were increased in July and August and they were increased on October 2. The difference between the wages paid in April and May, 1933, in my district, was the difference between $3.44 a day and $4.60 a day, beginning on October 2.

I think we put a wage reduction into effect December 16, 1933 in anticipation of the prices we would have to quote for business contracted for between January 1 and March 31 of that year. We feared conditions would become worse

and they did. In February, 1935, my company's wages were $5. In April, 1932 they were $4 a day. (666) In February of 1935 we were working under the NRA code and had [fol. 436] reasonable hope that it would be continued. I think Congress was considering extending the NRA for a period of two years at that time. In June of 1935 we were paying $5 a day as a wage scale under the extension that had been arranged by the President. The agreement itself had expired on April 1 and a number of extensions had been arranged for. I was not then hopeful as to the prospects in the coal industry as compared with my feeling in the spring of 1932. The Supreme Court had given the decision on the National Industrial Recovery Act and the NRA code had been eliminated. That was one of the factors that made it difficult to reach an agreement with the United Mine Workers of America for a new wage scale. (667) As to general business conditions, I felt much more hopeful in June, 1935 than I did in April, 1932, and particularly in April, 1933. In June, 1935 as compared with April, 1932, conditions in the coal industry were substantially better. I think the improvement that had been obtained was due to two things: First the working of the NRA code; and second, the establishment of relatively uniform wage schedules all over the United States under the Appalachian wage agreement. These two factors I think improved the situation in the industry as well as the improvement in general business conditions.

[fol. 437] Comparing the time before the NRA and the Appalachian wage agreement with the time after that (668) I think our mines produced about the same tonnages. The first six months of 1935 we produced at a higher average rate for the six months than we did for the three months July, August and September, but that was accentuated by a set of conditions. In the first quarter of 1935 there was a fear that a general strike was going to take place. (669) The production of the mines of my company was not higher than it had been prior to the NRA. The production before and after the NRA was approximately the same. The entire industry had an increase in production due to the improvement in general business conditions. Production was increased. I do not think the code had anything to do with the fact that the relative share of the nation's production enjoyed by my company was decreased. It remained about

stationary and relatively it would be somewhat smaller. The principal thing that affected our business was the policy of railroads purchasing their coal. We did not sell as much coal to certain carriers as we normally did. That change happened sometime during the years 1934 and 1935. (670) That was not simultaneous with the time I changed my mind about the Government's policy of the regulation of the coal industry. (671) The first time I ever took public position in favor of Government regulation was in June, 1933, before the enactment of the NRA. That is when I started to support Government regulation. So far as I had ever appeared [fol. 438] or made a statement, I had been opposed to Government regulation before that time. (672) I had been opposed to Government regulation practically all my life. The factors obtaining in the coal industry and the distressing conditions growing up around them had been making me change my mind about our ability. In 1931 we tried to set up voluntary regional sales agencies. After court action, the Appalachian Coals, Incorporated was finally declared by the Supreme Court to be legal and the agencies started to function about February, 1933. The effect of the Appalachian Coals, Incorporated, so far as I could observe, was not the answer to the needs of this industry. The difficulties that I had in my own district trying to get a sales agency organized made me feel that it could never become strongly enough organized in all the districts of the United States to affect the general situation. (673) I knew nothing about the workings of Appalachian Coals, Incorporated. We started preceding the Supreme Court's decision. We held meetings, wrote up by-laws, set up our capital structure, arranged for our contracts and took out our charter. I think the final report of the committee was published in June, 1933. I think the work began in 1932. There were a number of meetings which began in October, 1931. Our report was actually printed and published in June, 1933. We could not get enough signers. Other districts also failed. (674) When I testified before Congress in April, 1932, that:

[fol. 439] "Even in this period of slack operations there is nothing peculiar to the bituminous mining industry about employee distress and with the return of normal industrial conditions the labor situation will right itself, especially if the industry is permitted to eliminate wasteful methods of

operating and selling through the establishment of cooperative selling agencies, and is left free from the costly and restrictive control of a bureaucratic commission in Washington."

I certainly believed this advice, else I would not have given it to Congress. Thereafter, when I was unable to form a successful marketing agency and the other coal men were unable to do so, I changed my mind because the plan would not work. My advice to Congress was a little hopeful enthusiasm. I believed and hoped that the marketing agency would work but my own conclusions were, after trying to organize one, that we could not accomplish that end.

(675) I do not know whether the commission in Washington will be costly or not. I became satisfied to try that to save the industry. The term "bureaucratic" which I used before Congress in 1932 is a term one uses when one is opposed to any government regulation. There are other commissions than the Bituminous Coal Commission of 1935 that I exclude from that appellation. That is a derogatory term against a rule of doing business, rather than against any particular body. If you are going to try something new, and you are going to put your efforts and time and energy into it, you must, of course, be hopeful that it is going to work, and you must be convinced that it will work when you start out. I can say this cheerfully, that if all the operators in my district will join a regional sales agency, we can operate it successfully with the proper kind of a contract, but much to my disappointment, we could not get them to do that. They could not get them to do that in the Appalachian territory, where they organized one. They could not get them to do that in the Pittsburgh district, where they went to the point of preparing their report.

So that my hope and enthusiasm and belief was destroyed by the fact that the operators would not go along and try to operate it. (677) When I gave my advice to Congress as to the Bituminous Coal Conservation Act of 1935 it was based upon actual experience and the results obtained under the code of fair competition and the National Industrial Recovery Act. I think that regional sales agencies could operate successfully if a sufficient proportion of the tonnage [fol. 440] in each district would sign a proper contract and if every district organized one of a similar character and

equally strong. Then you would have violent competition between these larger units, unless they were permitted to make agreements with each other and coordinate their activities. If they made such agreements, you would have a real monopoly in the coal business. (678) I do not think it would be a good thing to have unregulated monopoly in the coal business. I believe the formation of marketing agencies would be helpful in each district but I can visualize a competitive war between regional sales agencies unless they are permitted to make agreements with each other.

There were certain minor violations by some of the code members in my district under the NRA code. I cannot give the dates. I think they happened oftener as time went on. I think they occurred in the latter part of 1934 particularly and in the early part of 1935. (679) The effect of that was to greatly weaken the code and cause people to have less confidence in it. It had not destroyed it. I think the weakness of the code was evidenced and its destruction apparent to everyone in the early part of 1935. As time went on, in 1935, certain coal companies did undertake to destroy the code. I think they had reached the point where it was evident that the code had broken down.

(680) I think there are several provisions in the Act that will make producers comply with the Act when they have [fol. 441] signed it. Primarily, if I sign the code and violate it I will have my taxes increased from 1½% to 13% on my gross sales price. Section 14 of the Act provides for elimination of people who are expelled from the Code from participating in Government business which I think is a very strong weapon to bring about compliance with the Code. I think those provisions apply to persons who do not join the Code. It would not be satisfactory from the point of view of the coal industry if that provision were eliminated. I think it should apply to those who have not yet accepted the Code. If the purpose of the Act is to be carried out, those who remain outside, if permitted to sell coal at prices below those in the Code, would break down the Code or take all the business that is available.

In other words, if the Code prices were based sufficiently high (681) that they might yield a profit to any proportion of the industry at all, people could reduce their cost by selling just below that level fixed, and in that way pro-

cure a volume of business that might return them a larger profit than the fellows in the Code. I have no desire to make anyone join the Code. I have a right, though, to ask for protection, if I can, for those who do join the Code, from the destructive and unfair practices, from those that remain outside. (684) I do now know what effect Section 3 of the Act has on those who would not otherwise join the Code. I know that certain companies came to our meet-
[fol. 442] ing (685) and voluntarily signed the Code on the receipt of papers from the Commission and filed them and voted and elected a district board. I know that certain other companies have elected to stay out of the Code. They must have had their own reasons and purposes in remaining outside, so that it had not sufficient compulsion to force about 20% of the production in our district into the Code. I am talking about the entire District 1. The producing districts included in the Eastern Bituminous Coal Association are Central Pennsylvania, the southern portion of Somerset County, Pennsylvania, the State of Maryland, and Grant, Mineral and Tucker Counties of northern West Virginia. I have general knowledge about other districts other than those. (686) I was a proponent of the legislation and was chairman of the special legislative committee (687) of what we call the National Conference of Bituminous Coal Producers, that employed legal assistance to draft this bill, or assist in the drafting of the bill. I participated as chairman and the committee partici-
[fol. 443] pated in advising with counsel.

(688) [There was offered and received in evidence as Plaintiff's Exhibit No. 60 a copy of the November 4, 1935 bulletin of the Bituminous Coal Commission.] (689) I have no idea why there is such a discrepancy between those who have joined the Code in my district, Indiana and Illinois (between 80% and 90%) and those who joined taking the country as a whole. In our district we have the United States Steel Corporation, the Bethlehem Steel Corporation, or Bethlehem Mines Corporation, and the Erie Railroad operations, all captive tonnage, who have not signed the Code, so far as I know, up to date, and we have some commercial producers who have not signed. The only two of those commercial producers whose position I know, and that only from the press, was the statement issued that Berwind & White Coal Mining Company and Consolidation

Coal Company had joined with three other companies, the Pittsburgh Coal Company, the Island Creek Coal Company, and the Pocahontas Fuel Company, not to sign the Code. That affected some other producers. Whether it was designed for that purpose or not, I do not know. (690) When I testified that 80% had joined voluntarily in my [fol. 444] district, I was including in the total tonnage the mines of the United States Steel Corporation, the Bethlehem Steel Corporation and subsidiaries, the Consolidation Coal Company and Berwind & White. They represent less than 20% of our district. Those four companies represent about 12½% or 13% of the tonnage of my district.

When I testified before the House of Representatives that control is necessary for order in the industry, I anticipated that control would bring order in the industry. (691) By that I mean that we would organize under the provisions of the bill, set up our minimum market prices and put into effect our fair trade practices, with the resulting stability in production and distribution. By stabilization I mean stability of competition, that is, fair pricing of coals to sell against each other in common consuming markets, and the other trade practices that go with such marketing, the maintenance of proper wage standards, maximum hours of labor, and conditions of employment. I think this plan for fixing prices will accomplish the intended result. I think it is a practicable plan and one that will bring about a fair situation as to prices. I have always had the idea that price control was one of the essential elements of any scheme of regulation of the industry by the Government. Another essential element is the proposition that there might be production control. I think that is an essential element. It is not provided for in this statute because it was taken out. (692) I think price con- [fol. 445] trol can be made to function almost as a production control temporarily, and if the finding of Congress is later than it is necessary to amend it it can do so and price control will operate a sufficient length of time to develop that situation, in my opinion. It is my opinion that the present Act needs the amendment to provide for limitation of production, finally, if it is going to be made to operate successfully. I think it could be made to operate successfully for the time being, as it now is. I think the first price list will operate successfully for a considerable

period of time. I would say it would go along for a year. (693) I think the price fixing plan under the NRA code worked successfully for a year without control of production. There was only price control and wage control in the code. The first evidence of the NRA code breaking down was toward the end of 1934. It had been in operation slightly over a year when it began to be apparent that certain coal companies were determined not to carry out the provisions. With respect to my testimony before the Senate of the United States in February, 1935:

"So far as I know, no price fixing plan has ever worked unless it had back of it control of production, and under this bill, control of capacity as well."

I still believe that to be a fact over a long period as a permanent plan. This is a four year Act and not a permanent plan. I did not tell Congress that I meant that no price fixing plan has ever worked except for a reasonable [fol. 446] period because at that time we were discussing a permanent bill without limitation on it. I wanted that statute to be passed. (694) I think my testimony there was in favor of the bill in principle. (695) I wanted the bill passed with the amendment I suggested in my testimony. (696) Those amendments did not include the elimination of the proration provision. I think we discussed the weaknesses of the provision that was in the bill. I am not sure. I think we discussed the improper grounds of the proration plan that was contained in that particular bill and I said they would not work and if put into operation would break down the Act. I wanted the statute that was up in June of 1935 passed although it had no provision for proration. I supported the bill because we could not get an agreement among the operators as to a method of production control and I suggested that we put into this statute a provision providing for a study of the question by the Commission itself, and let it make its report on that part of the measure to the next succeeding Congress.

In my opinion there are more available workers for the mines than the mines can give full opportunity to work.

(697) I would say that the flow of tonnage that was in effect for 1934 was satisfactory to me. It was unsatisfactory to many others. That is why we could not agree as

to what the normal flow was and that is really one of the questions that the Commission will have to give consideration to in its report to the Congress. I was willing to agree [fol. 447] to accept the 1934 basis of tonnage production in the respective districts as a basis of settlement of the plan. The middle district of Pennsylvania had lost a great deal of tonnage as compared to the rest of the country during the 20 years preceding that time. (699) With respect to my testimony before the Interstate Commerce Committee of the United States Senate that:

"We believe that the penalty for refusal or wilful failure to obey the code should be severe."

I had reference to provisions then in the bill denying the violators the use of the mails and the right to ship in interstate commerce, Section 14, and the provision at that time for a maximum tax of 25%. I never understood the 25% tax to be a penalty. I understood it to be a tax, and as a penalty for a violator of the Code. The tax was one of the items I had in mind when I referred to penalties. (700) I do not know whether it is a penalty or not when reduced from 25% of the sales price to 15% of the sales price. I think there are operators who can afford to pay the 13½% additional tax and continue to operate outside the Code successfully where they have very low costs of operation. I do not know whether those operators are such a substantial number that they will destroy the effect of the Code. When I testified this morning that I believed the statute would be successful in stabilizing the coal industry I meant it. So far as the companies which can evade the Code, the amount of the penalty taken out of their sales realization [fol. 448] will take whatever advantage they have in cost, and their competition will be fair. It will add to them that much additional cost. I think the 13½% tax added to their cost will stop them from breaking down the Code and Act. (701) It is to stop them from breaking down the Code and prices fixed under it. The payment of the tax by those producers will make it fair to the extent that it will stop the producer who has to pay the 13½% tax from selling the coal at such a price as would break down the Code. I do not know whether such producers would have to charge as high a price as those who join the Code but they would take out of their realization such an amount

that it would put them down to or below cost. Such a producer could sell at a lower price but he has to take 13½% out of the price he gets, and that, of course, would affect his net returns on the sales he made.

My company just about broke even in 1934. We had substantially no profits. (702) The 13½% tax on all sales would be very effective. I think our realization for September was $2 a ton. That would be 27¢ or 28¢ a ton. I do not know that our company will benefit from the imposition of this tax on those who do not join the Code. I think the entire industry will benefit by the Code. My company will only benefit in proportion as the industry benefits. We have concern about competition which is going to bring about tremendous losses, and we have tried out the competition, I think, since 1890.

[fol. 449] When I testified before the House that Pennsylvania has a natural market, I meant by that a market close-by, where freight rates ought to be substantially lower than from far-distant fields. It seems to me that the close-by field should supply the coal to those markets under any fair competitive circumstances. (703) That fair competitive provision would exclude far-away producers from selling into that market at dumping prices. I believe we should have a statute providing that what the law sets up and the Commission determines to be dumping prices shall not be charged. I do not know the volume, but the State of Pennsylvania does produce natural gas. I think West Virginia is the larger producer of natural gas. I think it is considerably larger, but I do not know. (704) I think every producer has a right to compete in every market.

I do not know of any companies that I believe will have to have a 13½% differential applied against them in order to make their competition with my company fair. I said that there were producers in the country that might be able to absorb the tax and still compete and I had in mind particularly strip operations in Illinois and Indiana. (705) So far as I know, only strip mines will require that a penalty of 13½% be imposed upon them in order to prevent them from competing with my company on fair terms. Only a small proportion of the production of coal in the United States is represented by strip mining. I would say [fol. 450] less than 10%. (706) So far as the mines of

Consolidation Coal Company are concerned, in my district, I have no fear of their competition, with or without the 13½% tax. With respect to Berwind & White I know their cost of production is about the same as mine, without the tax. I would say to the extent that they pay a greater tax than I do that they would injure themselves. (707) I do now know whether it would benefit me directly or not but I think it would injure that company.

(708) In my opinion a Federal statute is necessary in order to maintain prices that will prevent such wastes in coal mining as are incidental to low prices. Such a condition also can cause abandonment of mines, and probably the permanent loss of that portion of a field that has been opened up and developed, if it falls in or fills up with water, that particular portion that is opened up may be lost. In my opinion, unless prices are increased from destructively low levels, operators will cause waste. I do not believe that the industry is now at destructively low levels. I think some coal is being sold at very low prices but I do not think the general level has receded to destructively low levels. (709) I do not think it would do it until the effect of the contracts made in January, February and March of 1935 had passed out of existence, about April 1, 1936. Then, if there is no price list or no stabilization, I think prices will fall very low because that is when the bulk of the coal is sold. By that I mean to destructively low levels. I think those levels would be lower than in April, 1932, relative to cost of production. That is because cost of production is higher due principally to wage in- [fol. 451] creases. I do not think that wage rates will stay up without the statute. They will be reduced if we go into next January, February and March and sell coal at 25, 30 or 35¢ a ton below cost of production. Then immediate wage cutting will begin and the wage scale will pass out just as it did before. (710) I think prior to the time that you get to the conditions in 1932 you will have a national strike of very serious proportions. We did not have a national strike of serious proportions in 1932. We were non-union at that time. We had a different situation prior to 1932 while we were on the way down. In the first place, a large proportion of the mines were on a non-union basis and others went non-union piece meal. (711) This time, about 95% of the mines and miners are organized into a

union, and a national strike will cause a much more serious stoppage of production and shipment of coal than any other strike there has ever been in the country.

By the Court:

West Virginia, Kentucky, northeastern Tennessee and Alabama, which were formerly non-union, are all now organized. The unorganized 5% consists in some so-called company unions, Harlan County, Kentucky, and also some mines in western Kentucky.

By Mr. Whitney:

We now have in existence a contract which runs into 1937, governing wage rates. With respect to whether operators will breach that contract if prices decline, I can only say that competitive necessity did bring that about in the [fol. 452] period between 1924 and 1927 in a large way in the union fields. (712) I think the breaching of the contract would be the inevitable consequence of low prices. My company did not violate our contract the last time. We carried it out, but we had a strike after the contract was concluded anyhow. I expect we would have to go non-union if the rest of the country did. I do not know whether we would have to violate our contracts. I would hope not. Even if the contract were carried out for 1937 I question whether many operators would renew it if we went into lower prices at that time. If they did not renew it in 1937 they would make a strike i- 1937.

(713) The last authorized general strike that lasted more than a week of all the union fields in the country, I think, was in 1922. There were strikes affecting whole districts beginning in 1925. (728) The chief trouble with the coal business today is its excess capacity to produce and the surplus of offerings on the market of coal at continuously descending prices, which has been the situation from April 1, 1923. I think that bituminous coal carries an undue burden or proportion of the freight revenue of the carriers, the rates of which I think are higher than they should be. (729) When I testified in 1932 that "the chief trouble with the coal industry today is freight rates" I thought a decrease in freight rates would assist the industry in meeting competition from other fuels and sources of power, transportation being such a large proportion of the de-

[fol. 453] livered cost. I think our rates are loaded with an excess that is more than they should have compared with the cost of transporting other commodities. It was my opinion at that time, as I testified, that:

"It is my opinion that the most important thing that can be done to improve the situation in the industry is for the railroads to put the destination price of coal where it will successfully meet its present-day competitors, from whom they get very little traffic."

I think that the fact that the rates were loaded at that time and have been further accentuated by the recent increase of 15¢ per ton is one of the very important things even today. I think the most important thing to be done today is to put into operation the Conservation Act (730) and that the organization of producers that will grow out of it can secure proper consideration of the freight rate structure.

I do not suggest that the Bituminous Coal Conservation Act of 1935 has any provision for conservation in it except as I have previously testified with respect to the waste that might be preserved. The only provision to that effect in the statute is the fact that receiving a price based upon cost will produce the elimination of some waste.

The receipt of a price based upon cost will represent about 15¢ or 20¢ a ton increase in price to my company. My judgment is that that would be fairly representative of the increase in my district, based on current prices.

(731) Since my testimony in 1932, general levels of freight rates have not been reduced. There have been reductions in rates covering large areas—for instance, the rates to Pennsylvania have been reduced from 12¢ to 25¢ [fol. 454] and the rates to Baltimore and inside-the-Capes at Baltimore have been reduced 13¢. Rates in New Hampshire and for inside-the-Capes delivery at Philadelphia and to certain points in New Jersey, including the City of Trenton have also been reduced since 1932. With the 15¢ increase effective April 1, 1935 I do not believe there has been any reduction in the average weighted freight rate from my district as compared with 1932. I think it would be somewhat higher. (732) If we received a freight rate reduction to the extent of 50¢ to $1 per ton, I am not sure that it would do my company from three to six times as

much good as the Guffey Bill, measured in money. I think it might widen the markets for the distribution of coal to a considerable extent, as against other fuels. I still believe that freight rates are substantially too high on bituminous coal.

Whether an increase in our prices of 15¢ a ton will have any tendency to turn customers to competing fuels depends entirely on how the prices are set up. Our natural competitors are oil, natural gas and hydro-electricity. Hydro-electricity plants usually produce capacity. Competition with oil is something that fluctuates with the price of oil. The most serious effect of competition with oil that I can recall was during the period of lowest prices for bituminous coal, from 1929 up to 1932. During that time there was an importation of a great deal of foreign oil, principally from Venezuela, and we were successful in getting [fol. 455] Congress to levy an excise tax on imported oil of 1¢ a gallon (758). That stopped importations of crude oil (733) for industrial purposes very effectively and from that time forward the inroads made by oil competition on the seaboard have not been nearly so great. When prices were fixed under the NRA code there were more conversions—at least of the plants that I am familiar with—from oil to coal during 1934 than there were from coal to oil. Conversions from oil to coal or coal to oil depend a good deal upon the type of plant and equipment a plant has. A stoker plant cannot readily burn oil and such a plant has to scrap its stoker equipment, which is very expensive, and install tanks and other oil-burning equipment if it wants to buy oil for fuel. Anyone making that kind of a change must predicate it upon the assumption that he will get a price of oil low enough below that at which he can purchase coal to save his investment over the period of time for which he can contract for oil at that low price. I think the effect of inducing the Government to shut off Venezuelan oil from our market by a prohibitive duty was to stop the flow of cheap oil into the country and it may have had an effect on the price of domestic oil, but whether that is true or not I do not feel free to say absolutely. [fol. 456] (734) It may have contributed to the increase in the price of oil. I am not sure of that. Oil prices went up substantially in 1933. I think the increase in oil prices had something to do with the conversion from oil to coal

to the extent that when the price of oil did go up in 1933, oil was purchased at a low price and was limited in quantity and delivery. Specific amounts were delivered weekly to the plants that burned the oil and the oil producers would not give an additional amount of oil over that specified in the contract at the contract price at a particular utility plant. They were compelled to buy additional oil at the higher price and thus the general average cost of their fuel was increased. That was in Newark harbor.

(735) I think the delivered price of coal in the spring of 1933 in New York harbor of coal from the middle district of Pennsylvania would be about $3.75 to $4 a ton of 2,000 pounds. After the NRA started, our prices went up on that amount of coal about 60¢. The rule of thumb is something like 4½ barrels of oil to a ton of coal. Between the low point in the winter of 1932 and 1933 and after the NRA code came into effect, oil prices at tidewater in New York, I think, went to $1.15. The lowest published price had been 45¢ a barrel. (736) In equivalents there was an increase of $2.12 in oil to 60¢ in coal. I suppose that if coal prices are increased 15¢ a ton, there are places where [fol. 457] it will be desirable to buy oil instead of coal. The higher coal prices go and the lower oil prices remain the more conversions may take place. During the period of highest priced coal in the last four or five years, oil had gone up in a considerably greater ratio. I do not know whether the natural economy of oil production and distribution today will put oil prices up. They have gone down, I think, from $1.15 to 95¢ in recent months. That is a reduction of about 17%.

Where oil increased more than coal prices, I have experienced a tendency from oil to coal in public utility plants where the plant itself is adaptable to rapid conversion. (737) I do not anticipate conversions from coal to oil on an increase of 15¢ per ton in coal prices. I think there were some plants converted from coal to oil under the NRA. I know of one plant in particular that converted from coal to oil during that period. At that time oil prices went up nearly four times as much as coal prices, from what I have heard to be the low point in oil. Under these conditions, there still was some conversion from coal to oil. (738) I think the great amount of the conversions I know about were from oil to coal. I think that had something

to do with the service and the fear that oil prices would go much higher than they did. I do not think oil companies will make contracts at low prices over very long periods of time. (739) In the particular plant I have testified with [fol. 458] respect to, if coal prices are restored to code levels and oil prices stay where they are, I do not think there would be any conversion from coal to oil since the delivered price of coal would be $4.10 and that of oil higher. Wherever the coal price would be higher than the oil price and the plant would be equipped to use oil it would be attracted to the use of oil. Where it had to change its equipment to use oil it would be a matter of judgment whether it would do so or not.

(740) My acceptance of the Act does not wipe aside my desire to try to convince the Interstate Commerce Commission to reduce bituminous coal rates. I am anxious to do anything I can to improve the realization for coal at the mines of all districts, but that is because of my realization that I cannot increase the realization in my district without doing the same in other districts.

Redirect examination.

By Mr. Critchlow:

(742) The first strike in eastern Pennsylvania, in 1925, began when operators were unable to secure a revision of the wage agreement with the United Mine Workers and felt they were unable longer to compete with the low-priced coal coming from the areas that paid lower wages. They closed down their mines as union operations and began to reopen them as non-union. The first large company in our district that did that was the Rochester and Pittsburgh Coal and Iron Company. That company had an agreement with the United Mine Workers (the district agreement) [fol. 459] which lasted until March 31, 1927. It closed down its operations and went non-union because it could no longer compete with the prices being made by non-union operators. At that time, the State of Pennsylvania was not all organized. In our district, it was organized about 80%. The non-union operators in the district had usually paid the union scale, but had by this time gone to the $5 basis. (743) That was part of the competition that caused the Rochester and Pittsburgh Coal and Iron Company to

go non-union. It also competed with the Smokeless area of southern West Virginia and the high volatile fields of southern West Virginia and eastern Kentucky, which were all on the low-wage scale basis. I think their strike began in February and it lasted over a long period of time. I think their production dropped from 3,800,000 in the year before to 2,100,000 in 1925. The strike affected them to the extent of about 1,500,000 tons throughout the year. The mines were closed down for a period of time and did not ship anything and then they gradually got men working and built their tonnage up over a long period of time. It takes a long time to go from union operation to a non-union operation after you have been unionized about 30 years. There were other companies in the neighborhood of the Rochester and Pittsburgh that had strikes at about the same time—the Buffalo and Susquehanna Coal and Coke Company was one. I cannot recall the others.

(744) The other strikes in my district began after the [fol. 460] contract with the union had expired in 1927. The operators refused to renew their agreement and opened up their operations in the latter part of 1927 on a non-union basis because they were in a position then that they had no place to go with their coal. Everybody else had gone non-union by that time, except Illinois and Indiana, with whom we did not compete very much. Our own companies went non-union at that time. Other companies that went non-union were the Pennsylvania Coal and Coke Corporation, the Clearfield Bituminous Coal Corporation, Barnes and Tucker, Madeira and Hill, Sonneman Shaft Coal Company and a great many others I cannot recall at this time. There were strikes at all those collieries. They shut down the current on July 1. There was no production in July, practically none in August, and very little in September. It began to increase a little in October and November. And I suppose on about March 28 we were on a basis of normal operation. We still had coal and iron police and deputy sheriffs and searchlights and all that sort of thing because the United Mine Workers never did call the strike off. (745) I suppose in that particular part of the strike we had probably 15,000 men out. As an estimate I would say probably 12,000,000 to 13,000,000 tons annual production was involved. The companies involved had contracts for the shipment of coal to points outside the State of Penn-

sylvania at that time. The strike stopped all shipments for a period of time and permitted only a very small proportion at other times. Gradually the companies secured enough coal to supply their orders, but in the meantime they either [fol. 461] lost their business or purchased coal from some other operator to fill their orders. In our case we produced 2,163,000 tons in 1926 and 1,284,000 in 1927. During the month of July we produced no coal at all. In August we produced 12,990 tons; September, 30,970 tons; November 67,000 tons; December, 89,000 tons; January, 96,000 tons; February, 95,000 tons; March, 113,000 tons. Then we gradually increased from that time on.

(749) Conditions in the States of Pennsylvania, Ohio and West Virginia growing out of strikes at that time were the subject of an investigation made by the Interstate Commerce Committee of the Senate in 1928 and the Senate Committee held hearings in our district.

[It was stipulated that the record of hearings before the Committee on Interstate Commerce of the Senate on the conditions in the coal fields of Pennsylvania, West Virginia and Ohio, 70th Congress, First Session, 1928, is the transcript of the testimony of that investigation. It was agreed that the Court had the right to take judicial notice of the record of these hearings.]

(750) There were strikes in the eastern Pennsylvania district in 1933, beginning in July, and affecting a large number of operations, through August and September, up until the time the wage agreement was made effective October 2. In that district there were about 15,000 men out [fol. 462] at one time. The western Pennsylvania area was much more greatly affected by the 1933 strikes than eastern Pennsylvania. I would say probably 75,000 tons a day were affected by that strike in the eastern Pennsylvania district. Those strikes undoubtedly had the effect of preventing the shipment of coal from those districts to points outside the State of Pennsylvania on the days the mines were closed down. We were shut down during that strike. (752) There were no strikes after that date except of a very local and minor character until 1935 when the strike of five days was called and the whole district was out. That was a nation-wide strike. I think it reduced production the last week we worked from 9,000,000 to a little over 1,000,-

000 tons throughout the United States. I suppose it stopped all shipment except that 1,500,000 tons.

(753) I think the fact that the Coal Conservation Act had been passed had a helpful effect on negotiations. It gave some assurance that there would be some stability in the industry and that you could afford to sign agreements with that assurance. Just what its full weight was I do not know. It was somewhat helpful.

(754) In 1932 our wage rate in my district was $4.40 for the first quarter. After April 16 it was $4 and for the last two weeks in December it was $3.44. I cannot give you the figure of how many days a week we operated during that period. It was something around three or three and a half days a week, roughly. I think our district worked about 160 days. Our mines operated about the same time.

[fol. 463] (755) Recross-examination.

By Mr. Whitney:

I think the statement contained in the official report of the Department of Commerce, Bureau of Mines, entitled "Coal in 1927" is substantially correct, as follows:

"The restriction in the union districts therefore was counteracted by an expansion of mining in the two largest producing States south of the Ohio, which had easiest access to the markets normally served by the northern States. While this expansion measured in tons was not sufficient to keep production at the high level of the early months, still it was adequate to supply amply all current demands, and between April and October only 13,100,000 tons were withdrawn from storage."

The strike had much greater significance in those States affected, and did stop the shipment of coal in interstate commerce, and caused customers to pay more for the coal that they had to get to replace that which was shut down.

As a matter of fact, the non-union mines were able to supply this tonnage because there was a declining ratio in the consumption of coal during that period. Otherwise it could not have been done.

(757) Redirect examination.

By Mr. Critchlow:

During the period from 1924 until 1927 production was very rapidly declining in the eastern district of Pennsylvania. The reason for that decline was the absorption of the business of producers there, by mines working non-union, and on lower wage schedules, which quoted lower prices, and it was a case of constant price cutting in the markets that was taking away the business. The districts that improved their position most were West Virginia and Kentucky. (758) In 1923 the central Pennsylvania district produced 54,696,000 tons and in 1928 it produced 42,653,000 tons. In 1923 it produced 19.69% of the total production of the country and in 1928 it produced 8.06% of the total production of the country.

(1946) Referring to the colloquy at page 758 and following pages of the record, and in order to clarify his position, Mr. Whitney stated his admission to be that

(1947) "1. In answer to the questions there addressed to Mr. O'Neill, the answer would be:

" 'The competitive situation is such that the effect upon intrastate sales resulting from a minimum price regulation for interstate sales, if such regulation were not applied to intrastate sales, would be to give such a competitive advantage to the intrastate seller that the interstate seller could not fairly compete with him, so that there would result a discrimination against the interstate seller.'

"2. That the other Government producer witnesses would each make the same answer in respect of the producing and marketing territories as to which they testified and as to the other areas of substantial production throughout the country to which they testified.

"Mr. Whitney stated that he made no concession as to the legal effect of such evidence upon the issues in this case but that he makes no contention that such evidence is incompetent or inadmissible as a conclusion."

[fol. 464] (762) HARRY O. FINDLAY, a witness called on behalf of defendants, first being duly sworn, testified as follows:

Direct examination.

By Mr. Critchlow:

I have been in the coal business over 30 years. I entered the Youghiogheny Coal Company in 1902 and occupied various capacities in that organization until 1912 when I was made general sales manager of the company. In 1915 I was made vice-president in charge of sales and other executive duties. I have been in that position with the company since that time and have had charge of the sale and distribution of all coals. I am also president of the Simpson Creek Collieries Company since 1924. Both of those companies own and operate bituminous coal mines. The Youghiogheny & Ohio Coal Company owns (763) and operates mines in western Pennsylvania, eastern Ohio, the middle district in Ohio and also in Boone County, southern West Virginia. The Simpson Creek Collieries Company owns and operates two large mines in the Fairmont field of northern West Virginia. In addition to the coal which those companies produced (a capacity of about 5,000,000 tons per year), they purchased and resold from 500,000 to 750,000 tons of coal a year. The Youghiogheny & Ohio Coal Company owns and operates coal storage docks at Superior, Wisconsin, and at Milwaukee, Wisconsin and also operates a dock at Bridgeport, Connecticut. Our coal produced in western Pennsylvania moves to the Great Lakes, to Canada, [fol. 465] and Ohio, New York State, New Jersey, Delaware, the New England states and to tidewater. Our Ohio coal, in addition to being sold in Ohio, is shipped into Pennsylvania, New York, Canada, the Great Lakes. From both of these districts we also ship a substantial tonnage of railroad fuel coal. The coal we produce in Boone County, West Virginia, moves for the most part to Michigan, the Great Lakes, Ohio and Indiana. (764) Those coals compete with practically all coals mined in the Appalachian area in one or more of the consuming markets. Shipments from our mines in northern West Virginia moves to the

railroads, to tidewater, to the New England states, New York, New Jersey and Delaware, principally.

It has never been our custom, nor is it the custom of the industry generally, to operate our mines unless we have orders on which to ship coal. We sell the greater part of our coal through our own sales organization. That organization secures either contracts or spot orders from time to time and when the customer makes requisition for shipment of coal the order comes into the general office or the branch office and is then conveyed to the mine, and when there are sufficient of these orders to operate the mine, the management of the mine calls the men out to work and starts the mine. That is the custom generally, I think, in the industry.

(765) The difference between sized coal and slack coal with respect to its marketability depends a great deal upon what kind of coal it is. Certain coal will have prefer- [fol. 466] ence on the part of the buyer as a domestic fuel and those are usually screened into the various sizes that the domestic trade requires. Other customers, such as the railroads, for the most part, use mine-run coal. Some by-product plants use mine-run coal. For the most part, it is the coals that are suitable for the domestic market that are screened. It is always more or less of a problem to balance our orders for sized coal against our orders for slack coal. When you have an accumulation of orders, for instance, for lump and egg and stove coal, and at that particular time may not have sufficient orders for slack to take care of the amount of slack that these sizes will make, the problem arises. The custom is under such a situation that you operate the mine and ship out your prepared sizes until such time as your mine tracks become blocked with slack. If that time arrives you of necessity have to close the mine down until you can dispose of that slack coal and clear your tracks. Slack coal produced under the conditions I have just described might become distress coal. You may succeed in getting orders for a part of it for prompt shipment and will not be able to sell the balance. (766) Coal of that kind by some operators is frequently moved out in order to clear the tracks to the railroad scales or some consuming point and there offered on the market at distress prices. Frequently, it is offered through ten or a dozen shippers or middle houses and the buyer under those conditions gets the impression that there is a great deal more coal being

[fol. 467] offered on the market than really is. Under those conditions the offering of 10 cars might mean to buyers 100 or 150 cars. Very little coal, generally speaking, is stored at the mine. The amount would be infinitesimal as compared with the whole.

The difference between the delivery price and the mine price is the transportation charge from the mine to the destination. Delivery price really makes competition. The buyer is interested in the price at which he can obtain the coal delivered at his plant. (767) Between 1923 and 1927 we were paying in Ohio a wage rate of $7.50 a day. I am familiar with operations generally throughout the State of Ohio. During that period the entire State of Ohio was unionized and employees were members of the United Mine Workers organization. All of the State of Ohio went through with the agreement with the United Mine Workers until March 31, 1927. Strikes developed after that. I am familiar with conditions in the mining fields in the western part of Pennsylvania. From 1923 to 1927, for the most part, western Pennsylvania was under contract with the United Mine Workers. (768) There was some non-union coal produced in western Pennsylvania but most of the commercial mines had a contract with the United Mine Workers at $7.50 a day. The mines in western Pennsylvania that were under union contract did not continue operating during all of that period at the union rate. The effect of the reduction in wages in the unorganized fields after the signing of the Jacksonville wage agreement was felt more promptly and more keenly in western Pennsylvania than it was in some of the other districts. The largest mine that [fol. 468] we operate there, producing 3,000 tons per day, shortly after the Jacksonville wage agreement went into effect, was unable to get enough business to operate and was shut down for 22 months and did not resume operation until May 26. In the meantime, the economic pressure in that district became so great that in the early part of 1925, the largest producing company in the district attempted to put its mines on an open shop basis and that struggle continued for something over a year. Other companies at different times attempted the same thing. (769) At the expiration of the 22 month period during which our mine was closed, our miners came to us and petitioned us to put them back to work at the union wage, which, after some

negotiation, we finally consented to do. As a result of that action at one mine all our other miners in western Pennsylvania went on a strike, and one of our mines was idle from that time until nearly two years later. (770) One of the others was idle for about 18 months. Consumers who had been using coal from western Pennsylvania were obliged to go to other states for their supply. This was caused by the inability of producers there to compete on the high wage scale in competition with the unorganized fields that were on a much lower basis. The production of western Pennsylvania during that time went down very much. The production of my own company in western Pennsylvania in 1924 was just about half what it was in 1923. We remained at a very low figure until several years later, when we were on an open-shop basis and were able to more nearly meet [fol. 469] our competition. (771) From the period of 1923 until the adoption of the NRA code there was no single year at our mines in western Pennsylvania or Ohio that realized a price equal to cost. In every year the average cost exceeded the average realization. The cause of this disparity was the intense competition we had to meet to try to stay in business.

(774) I have personal knowledge of only our own wage rates, in the unorganized fields south of the Ohio River during the period 1923 to 1927. I know, in a general way, about other rates but can speak from personal knowledge only of the rates we paid our mines in Boone County in southern West Virginia. That territory had been organized for some time but went on an open-shop basis, according to my recollection, some time in 1922.

(228) During the course of his reply to Mr. Dickinson's opening statement, Mr. Whitney made the following remarks:

"There is one point, I am happy to say, that we are really agreed upon, and that is that f. o. b. sales are sales in interstate commerce. We do not make any suggestion that if we resort to unfair competitive practices in our f. o. b. sales, unfair methods of competition, we are not subject to regulation today by the Federal Trade Commission. One of our Circuit Courts of Appeal was reported last week in a case enjoining a certain operator from calling his coal "New River Coal", as being an unfair method of competi-

tion in f. o. b. sales, with another operator who really had New River Coal.

"Of course, all those things are being done today by the Federal Trade Commission, and there is no question about that. We do not suggest that the f. o. b. sales are themselves wholly intrastate."

(781-783) Mr. Whitney objected to the following question by Mr. Critchlow to Mr. Findlay:

"Q. Mr. Findlay, I wish you would tell us in some detail what the course of business is in the coal industry with reference to the way in which orders are solicited, what is done with orders when they are obtained, and how the orders are filled. Do you understand my question?"

During the course of a colloquy among counsel and the court, the following statements were made:

"Mr. Critchlow: The question has to do with f. o. b. sales, whether or not in this industry the business is carried on in a way so that sales which have been referred to here as f. o. b. sales are sales in interstate commerce. That is one of the issues, the course of business in that respect.

The Court: I understood it would be admitted by Mr. Whitney that this would refer to that, that they would be sales in interstate commerce.

Mr. Critchlow: If that is admitted I will not ask the witness to answer the question.

Mr. Whitney: I have not changed my mind since I admitted it, so I will not repeat it.

Mr. Critchlow: You seemed to make the admission at one time, and then later to change it.

Mr. Whitney: Let me look it up in the stenographic record."

Nothing further was said on the subject by Mr. Whitney.

Mr. Critchlow then asked Mr. Findlay the following question:

"Mr. Findlay, it is a fact, is it not, that it is customary in this industry to make sales f. o. b., with the understanding between purchaser and seller that the shipping instructions are to be handled by the seller, and that the coal is

to be destined to a particular point and not be stopped in transit or re-routed by the purchaser, is that correct?"

(783) There are two kinds of sales in our industry. One is what we call f. o. b. mine sales and the other what we call f. o. b. some destination point. In most regular contracts the contract of sale provides for f. o. b. mine prices. The contract also specifies that the coal is for delivery to a consumer at a certain point. Most contracts also specify that there shall be no diversion of the coal without the consent of the seller. In handling that at the mine, the producer's shipping clerk will order the cars to take care of the orders, will bill the coal out and see that the cars are tagged, and will furnish a bill of lading to either the buyer or the company; (784) that is the custom. We have many [fol. 470] sales in the industry, for instance, like Lake sales, or tidewater sales, that are made f. o. b. a certain destination point. The sales we make from our docks for the most part are made f. o. b. cars at the dock and in those cases we prepay the freight and all transportation charges, both rail and water, and whatever charges are necessary to take care of the cost of transferring coal onto cars at the dock. There are also sales made at tidewater and at the Great Lakes f. o. b. vessel. These various classes would cover the great bulk of the sales that are made in the coal industry.

From 1923 to 1927 the Ohio, northern West Virginia and western Pennsylvania fields were all under contract for their labor with the United Mine Workers of America and were paying for the most part the $7.50 a day scale. (785) The trend of mine realization prices in those fields was progressively downward from 1923 on into 1934.

(786) [There was offered and received in evidence as Defendants' Exhibit No. 23 a table entitled "Average value per ton of coal at the mines by States, 1913-1934".]

In the period from 1923 to 1928 it was impossible because of the conditions prevailing and the constant drop in prices to secure a realization for coal which would be equal to cost. Mines for the most part in my district were receiving varying but falling prices. (787) That reduced very materially the number of producing mines. It forced producers to concentrate their production in their most fortu- [fol. 471] nate and lower cost mines and forced out many

of the higher cost mines. My own company in the past 12 years has been in 6 mines in Ohio. At least five of those will probably never be opened up again. I think the mines are representative of the conditions there. (788) As a result of the abandonment of those mines there will be a very considerable acreage of coal which can never be recovered. Under different circumstances it would have been possible to have operated those mines and recovered that coal. (791-792, 796) [Mr. Whitney then stipulated that conditions in the mining communities occasioned by decline in price brought about the closing down of many mines; that this threw many men out of employment; that whole communities built up around those mines and dependent entirely upon the mines were left without substantial means of support; that the effect of this condition was a disastrous effect on the other side of the industry; that there were men in the settlement located nearby, inhabited by miners, and that some moved away and some stayed there and those who stayed there, having no means of livelihood, were like other people who had no way of earning a living.]

(797) The decline in prices caused a marked decline upon the shipment of coal from the State of Ohio into certain areas.

(798) [There was offered and received in evidence as Defendants' Exhibit No. 24—A table entitled "Shipments into Indiana, years 1920-1934 inclusive"; as Defendants' Exhibit No. 24-A—A table entitled "Shipments into Ohio, [fol. 472] years 1920-1934 inclusive"; as Defendants' Exhibit No. 24-B—A table entitled "Shipments into Michigan, years 1920-1934 inclusive"; as Defendants' Exhibit No. 24-C—A table entitled "Trend of Lake cargo shipments, 1920-1931 inclusive"; and as Defendants' Exhibit No. 24-D—A table entitled "Trend of tidewater shipments since 1920".]

(799) I should like to point out two or three outstanding examples of the trend. On Defendants' Exhibit No. 24-C the tonnage shipped to the Lakes from Western Pennsylvania in 1923 was 9,528,966 tons. By 1925 that had dropped to 2,479,083 tons. In the matter of shipments from Ohio to the Lakes, in 1923, they were 5,941,938 tons and by 1925 had dropped to 1,450,230 tons. Correspondingly the tonnage from the southern high volatile fields in 1923 to the

Lakes was 8,262,571 tons and by 1925 had doubled and were 16,321,178 tons. Two years later it had increased to 18,883,908. In the four year period the southern high volatile producers had increased their Lake cargo shipments by over 10,000,000 tons. (800) There were strikes during that period that affected somewhat the tonnage shipped from western Pennsylvania. A strike started there in 1925. There were no strikes to speak of in my district from 1924 to April 1, 1927. It is my recollection that there was a change during that period in the Lake cargo freight rates which increased the differential in favor of Pennsylvania and Ohio coals. I think that Lake cargo decision was made in 1925.

(801) Due to the very extreme competitive conditions [fol. 473] that developed after the Jacksonville wage scale was entered into it became necessary to put the mines in northern West Virginia, western Pennsylvania and Ohio on an open-shop basis in order to try to meet that competition. In trying to do that there were many strikes in those areas. Those conditions became worse after all the mines went on an open-shop basis. Instead of having only the competition of the open-shop mines in other districts, the mines were then competing with each other in the same district, and it got to the point that there was really nothing but chaos in all these fields. It was in many instances impossible to know what your neighbor was paying in the way of wages, and when you would go out to bid on a piece of business it would be impossible to know whether you would have to bid within 5¢ or 50¢ a ton of the price at which the business would be awarded. There was no stability whatever in the industry all during the period between April 1, 1927 until the fall of 1933. Conditions became progressively worse throughout this period. (802) The wage trend was down. The wages in Ohio, northern West Virginia and western Pennsylvania got down as low as between $2 and $3 per day. The miners in some cases did not average more than three days work per week, except in certain mines that had special business to give them better operation. In the early part of 1933 the men in those fields in most cases were not earning more than $6 to $10 a week to keep themselves and their families. (803) Prior to 1927 the wage rate in that area had been $7.50 per day until the companies started to break away from the Jacksonville

wage scale in the latter part of 1925 and 1926. (805) Mr. O'Neill's testimony as to the manner in which wages were [fol. 474] fixed in the central competitive field during the period from 1927 to 1933 is substantially correct.

(806) The organized workers resented the attempt to put others into their jobs and resisted as hard as they could. They would not themselves accept a lower rate and it was necessary to bring in miners from other sections. That resulted in disorders. We had one case in our mine in northern West Virginia when the mine workers set our mine on fire and that mine was sealed for three months during which time we could ship no coal. The mine has a capacity and was shipping at the time about 2,500 tons per day. The coal was practically all sold in interstate commerce. We were not able to take care of our contracts during that period on our business in other states. The same property was hampered at that time by the blowing up of a railroad bridge leading up to the property which interfered with our shipments. I am mentioning that as only typical of many things of the kind that happened in these fields while this struggle was going on. It is my recollection that the fire occurred in the latter part or toward the middle of 1926. (807) At that time, my company was under contract with the United Mine Workers. After the mines were shut down for some time some of our men came to us and asked us to put them to work, which we agreed to do at a wage lower than the contract wage. The other men resented that and resisted it and that is what brought about the trouble which I have described. It was a case of economic necessity.

[fol. 475] By the Court:

(808) The $7.50 daily contract rate continued but in western Pennsylvania and northern West Virginia some of the operators broke away from that before the expiration of the agreement. The Jacksonville agreement became effective on April 1, 1924, and ran through until March 1, 1937. That was an agreement with the United Mine Workers, by the organized fields.

By Mr. Critchlow:

(809) [Mr. Whitney stipulated that the western Pennsylvania operators broke away from the Jacksonville agreement when Mr. O'Neill said they did.]

(810) The mine price of coal in my area, Ohio, western Pennsylvania and northern West Virginia continued to fall from 1928 to 1933.

There was a slight upturn in those states in prices in 1933 due largely to the fact that the NRA code became effective on October 2, 1933 and that code prices were established on a basis considerably higher than the prices that had prevailed prior thereto. (811) Wages were also established at much better standards and as a result of the NRA code the entire industry became stabilized and was put on a basis where the miners could make a reasonable wage and the producers a small profit which was something the industry had not had in over 10 years. Just prior to the formulation of the code conditions were worse than at any time during my 30 years in the coal industry. Wages were low and men could not earn enough to live on and keep their [fol. 476] families. There was distress everywhere. The capital assets of most of the companies were being rapidly depleted, and the industry as a whole was very rapidly drifting into bankruptcy. Even the stronger companies were having a difficult time to maintain themselves. It would only have been a question of time, I think, when the strongest companies in the United States would have been forced into financial difficulties. A number of the large companies were already in financial difficulties. One of the largest companies in the country, the Consolidation Coal Company, was in receivership at that time. (812) There were a good many others in receivership. Many went into bankruptcy and had to pass out of the picture entirely. The operators in those areas continued to operate to keep their position in the industry. When you open a coal mine and get it under way it is not an easy matter to abandon it. You have certain fixed charges that go on continuously whether you are operating it or not, such as minimum royalties, taxes, and supervision around the mines. It is frequently the case that you lose less money by continuing to operate than you would by shutting down entirely. That brings about a struggle for business because the mine that can run full can produce the coal at considerably less cost than a mine that will run 50% or 60% of the time. It has been that condition, very largely, that has intensified this competitive struggle. Since May 27, 1935, the very intense [fol. 477] competitive struggle was resumed and is becom-

ing worse day by day. I know of many cases where coal is being sold today at figures from 25¢ to $1 per ton below the actual cost of producing the coal. (813) Those are spot sales. Most of us have contracts that have carried over from the code period so that we are getting a better realization than those prices would indicate, but if the struggle continues without regulation we are going back to the same conditions that prevailed in 1933, even more intensified, I think. I know of no attempt made by separate states to stabilize the industry and help it out except one that took place in a conference of the governors of several of the states back in 1930 or 1931. As a result of that conference, the movement for the organization of central sales agencies developed. That is the only thing I know of that developed at all, of any practical nature, as a result of that conference. The purpose of that conference was an effort on the part of the governors of those particular states to bring about some plan for stabilizing the industry. (814) I do not think they ever had any definite plan. It was just a conference, so far as I have been informed, to discuss the situation and see if it would be possible to develop any feasible plan for stabilization of the industry.

After the Supreme Court decision in the Appalachian case an organization was set up covering the eight districts in that area and one also was set up in Ohio shortly after Appalachian was organized and a second one sometime after [fol. 478] that. Those three organizations are the only ones that I know of that have really functioned. My company was a member of Appalachian Coals, Incorporated, for our southern West Virginia property. I was chairman of the organization committee that set up Northern Coals, Incorporated, in Ohio, and was a director of that company after it was organized. We in the industry for the most part accepted that plan in the hope that we might be able to work something out of it of a practical nature and stabilize the industry. Appalachian Coals and Northern Coals did succeed in improving the methods of selling their coal and probably did considerable good in extending the distribution of their coal. They furnished combustion engineers to go out and help show the buyer how to use their coals. (815) In ways like that they were very beneficial, but as to stabilizing the industry they have been very ineffective for the reason that they were not able to get all

of the producers in the respective districts into their organization. Those that remained out set the price for those that were in and they had competition from other districts that were not organized in any way. The net effect has been that it has been impossible to maintain any fair price structure through those organizations, although, when they started, we were all hopeful that something of the kind might be developed and we would be able to get a price for coal which would enable us to do what we finally did under the code, pay our labor a reasonable wage and at least come out even on our sales. I have studied that situation very carefully and have been living with it for some time, and I am absolutely satisfied that there is no way in this industry that it can be stabilized without some effective Government force bringing about that stabilization. The industry just cannot do it itself.

The industry under the Bituminous Coal Conservation Act will probably not realize prices that will be in excess [fol. 479] of cost. Minimum price area No. 1, for instance, which produces over 90% of the coal that is produced, in the ten month period from April 1, 1934 to January 1, 1935, under the NRA code (816) had a total weighted cost of $1.83 and a total realization of $1.86, realizing a margin over cost of approximately 3¢ per ton. Under the Act, so long as there is a large overproductive capacity pressing for a market, in my judgment the minimum price will be a maximum price, except in times of emergency, so that the aggregate prices of that entire area will probably not exceed the total weighted cost of producing the coal in that area. Prior to the NRA code we were all selling coal way below the cost of producing it and were paying our labor starvation wages so under the code we raised the wages to the labor and also raised the price of the coal so that there was a material increase in the sales price of the coal after the code went into effect. (817) It has been customary in the coal industry for many years to charge a greater price for prepared sizes than for fine coal. That custom was followed to some extent under the NRA code in the pricing of coals. There is also the question of industrial competition. For the most part industrial buyers are large buyers and the custom of the coal operators has been to try and attract those people with a lower price. There is also involved competition with other fuels such as oil and gas and

I think there is a necessity of keeping those sizes possibly below some of the other sizes. It is a fact that due to the higher price for the prepared sizes the domestic consumer [fol. 480] pays more than his fair share of the total realization for the coal. (818) That was corrected to some extent under the code. We got a better realization for the fine sizes than we had prior to that time and I think that would be the result under the Conservation Act.

I think that the effect of stabilizing hours and wages in the manner provided for by the Code provisions of the Act will be to put the industry on a permanently stabilized basis. I base that on the results obtained from the NRA code. I think this will work very much the same way.

If there is a decrease in the hours worked per day and the same total wage paid for the decreased hours, it increases hourly compensation to the men, and the opposite would be true if the hours were increased. It has been the custom in the relationships that have existed between the producers and the organized mine workers to tie together wages and hours in their negotiations of wage contracts.

(819) Cross-examination.

By Mr. Whitney:

Contracts that call for f.o.b. sales and deliveries are usually based on wages being paid in the mines at the time the contract is made. They do not customarily contain provisions providing for the details of the wage scale in the mines. Some contain a provision that the price goes up or down with the increase or decrease in wages. (820) It is not usual for these contracts to specify what the wages or [fol. 481] hours of the men at the mine shall be, what shall be the conditions in the mine as to collective bargaining with the men or what shall be the safety provisions and conditions in the mine. The buyer has nothing to do with that.

Referring to Defendants' Exhibit No. 23, the fact that Ohio had an average realization in 1923 of $2.43 and an average realization in 1933 of $1.20 being a decline to 49% is a serious decline. (821) The decline in West Virginia of mine realization average from $2.65 in 1923 to $1.14 in 1933, a reduction to 43%, was apparently more serious than the Ohio decline. I would say generally that West Virginia

coals are superior in quality to Ohio coals, although some are of equal quality and others probably not so good. (822) A substantial reduction of realization would reduce the number of producing mines in any district, including West Virginia. It would also make it impossible for West Virginia operators to get their costs back.

It is a good thing that production be concentrated in the more efficient and lower cost mines. That will be brought about under the Conservation Act.

(824) My judgment would be that by the end of May or early in June many producers were selling their coal at from 10¢ to 25¢ below cost this year. That would not be the general weighted average in minimum price area No. 1. I am speaking of spot sales.

(827) In view of the increase in cost of production due to the increase granted the miners under the new wage [fol. 482] scale, there probably will be some slight increase in the weighted average of prices in minimum price area No. 1 under the Bituminous Coal Conservation Act during the first year of operation over the prices that existed under the NRA code. They will be higher than the prices that existed in June, 1935, after the NRA code had come to an end. (828) I think in most districts the increased wage will amount to somewhere around 15¢ a ton. I think that will be about the average. I cannot tell how great will be the average increase in price. (831) In June of 1935 we were not still operating under the NRA code. (832) Prices will be higher under the Act than they were in June, 1935. When I testified at the end of June, 1935, before the House Committee as follows:

"Mr. Cooper. Is it your thought that there will not be any increase in the price of coal if this bill should become law.

"Mr. Findlay. My honest judgment, Mr. Cooper, is that there will be no increase in the price of coal, based upon the present wage scale. In fact, I think it will be a few cents less."

I was thinking about NRA prices.

(835) When I testified before the House of Representatives in June, 1935, that

"When we sell coal, as we are doing today, from 30 to 50 cents a ton below cost approximately, you cannot continue to get enough money to pay those wages."

I was talking about spot prices. (837) I would not say that spot prices give a representative view of prices prevailing at any time. (845) With respect to Defendants' [fol. 483] Exhibit 24-C, it is shown that western Pennsylvania's production increased from 1927 when it was 3,597,150 tons to 8,541,399 tons in 1930, Ohio increased from 344,834 tons in 1927 to 3,363,295 tons in 1930, and the southern high volatile coals decreased from the figure of 18,833,908 tons in 1927 to 15,798,367 tons in 1930. I would not derive from that that the southern high volatile field was taking away the markets of Ohio and western Pennsylvania. There were different conditions that prevailed during those years, starting with 1927. Western Pennsylvania districts were already on an open shop basis, and Ohio started in that year to go on an open shop basis, and as they got their wages down to lower levels they were enabled better to compete with the southern fields. I cannot say whether Ohio will get further tonnage back under the Bituminous Coal Conservation Act, (846) but there is nothing in the Act that would indicate that they would. I do not believe Ohio can hope to increase its production under a proper coordination of prices, which the Act provides for, beyond what it had approximately for the last year or two.

Despite the increase in production in Ohio high volatile from 350,000 to 2,096,000 tons in 1933, there was no stability in the industry. I mean by stability to have the industry on a basis where it can pay its labor a fair wage and get at least cost and possibly a small profit out of the sale of its coal. In 1927 we started off, as I recall it, on a $5 a day wage scale. (847) I have not any figures as to what [fol. 484] the annual earnings of labor in Ohio were in 1927. The mine workers did not get fair annual earnings because the state was on strike practically all of that year.

In 1928 I advocated stability. I had a plan which I wanted to submit to the Senate Interstate Commerce Committee, which was investigating the industry at that time, which contained a good many of the same features that the present Act contains. I submitted it to a group of coal

operators who turned it down and asked me not to put it in because they were fearful that it would, if submitted to the Committee, bring the union back into the picture. (848) I was of opinion right along that the union would have to get back into the picture before we had any stability. (849) In 1928 I felt that if we got fair freight rates in Ohio we could hold our own. I think the differential at that time over southern West Virginia in shipping a ton of coal to be delivered x-Lake was 28¢ in favor of Ohio. The differential today over southern West Virginia is 38¢. (850) Ohio, therefore, has 10¢ more advantage over West Virginia than in 1928 so far as freight rates are concerned.

Prior to the mine fire in our West Virginia mine in early 1926, we had a contract with the United Mine Workers, the Jacksonville agreement. By its terms that was to run three years from April 1, 1924 to March 31, 1927. Our mine was open on the day of the fire and operating. I do not recall the exact wages we were paying but that was after we [fol. 485] had started the mine on an open shop basis. The wages were lower than called for by the Jacksonville agreement.

(851) A substantial number of our men came to us and petitioned us to put them to work at less wages. Some of the men did not see fit to go along with that program and fought it. We went ahead with the program just the same. (852) That might have been a technical breach of contract. It was a case absolutely of self-preservation. That mine sells in competition with western Pennsylvania, Ohio and some of the high volatile fields. That mine had been producing 2,500 tons a day and the tonnage for all of those fields would run into several million tons a day. In 1926 there were a number of other cases in the northern West Virginia field whose mines were burnt down and there were violent labor disturbances in western Pennsylvania. (853) I do not recall whether the circumstances were the same as at our mine in northern West Virginia but there were stoppages due to picketing, violence, etc. I would not be able to even guess as to the approximate number of tons per day those stoppages amounted to. This was one of a number of similar occurrences. The number of mines destroyed at that time would be small in relation to the percentage of production of the entire field.

(854) In the year 1933 we only had the benefit of three months of the Bituminous Coal Code, which was not reflected to any great extent in the average realization for that year. We did not feel the full force and effect of the code under the N.R.A. until 1934. The NRA code went into effect on October 2, 1933. Commencing with that the industry felt the improvement in conditions, from that time on for the balance of 1933. (855) This was largely due to increase in prices. When I referred to the entire industry, that possibly was too broad a statement. What I had in [fol. 486] mind was the industry east of the Mississippi River. I know nothing about Texas or any of the western states or what their conditions were. Their tonnage is very small compared to the total. The area I speak of east of the Mississippi River produces from 90% to 91% of all coal produced. As I recall Mr. Tryon's testimony the very large acreage of coal that is left in this country is in the west, but is at present inaccessible to the consuming markets.

The chief reason for the NRA code breaking down was lack of enforcement. (856) It had some criminal provisions in it but they were not enforced. There are a number of provisions in the Conservation Act that provide for adequate enforcement if they are exercised. (858) One goes to the Bituminous Coal Commission's authority to issue cease and desist orders. There is also Section 14 which provides that the Government and governmental agencies shall buy only from code members. There may be others there that I do not recall. (859) So far as the tax feature is concerned, as I see it, the coal producer either has the option of going into the Code or of staying out of the Code. There is nothing there to compel him to go into the Code so far as I interpret the Act. (861) My company had not made 13½% of its sales price in the form of net profits at any time within the last five years, nor do I know of any companies in my district which have.

There was competition during the NIRA in the coal business. I do not think prices fell below cost during the [fol. 487] period of the NIRA. I do not think they fell below cost after January 1, 1935, because there were contracts that ran over that period that would bring the average

realization probably equal to or a little better than cost, taking the industry as a whole. (862) There may have been some sections where there was a loss. I do not know what was the weighted average realization in minimum price area No. 1 from January 1, 1935, to May 27, 1935. (863) I would say that the total average realization in some districts, due to contracts that carried over, would be better than cost, and in other districts would probably be below cost.

(864) It was my belief in June, 1935, that there would not be a wage increase when the agreement came up for renewal. There was such a wage increase on October 1. (866) The industry was not stabilized in June of 1933. For about one year the NRA code was very well observed and I think the reason for that was that the industry as a whole thought the provisions of the code would be enforced. When it developed that they were not to be enforced, many producers then started out on their old tactics of trying to get business and reduced their prices and tried to take business away from their competitors. (867) That had an effect upon the entire industry because there was enough of that done in almost every district to affect business of almost every producer. I think the code was of very great benefit to the industry. I think the new code will work satisfactorily for much longer than a year. I think there [fol. 488] are provisions in this code, by Act of Congress, that will give the enforcement bodies opportunity to effectively enforce the code, which they did not have under the old code. I tried to enumerate these provisions in my earlier testimony. The provision with respect to public contracts is one of them. I think there was a provision under the NIRA that no company could have public contracts if it sold coal in violation of the code. I also refer to the power of the Commission to issue cease and desist orders. (868) I do not recall that there was the power to issue cease and desist orders and to have injunctions against violators of the old code. I may be wrong on that, however. There was not a tax in respect of the NRA code. (869) I cannot think of any other enforcement provision in the new code that differs from the old code.

Referring to the governors' conference with respect to which I personally testified I do not recall how many gov-

ernors there were. I think the states represented were mostly from the coal bearing states south of the Potomac River. I do not put much emphasis on the governors' conference. I just brought that out as leading up to the formation of the Appalachian organization.

(870) I was a member of the legislative committee of the National Conference of Bituminous Coal Producers, which advocated this statute.

[fol. 489] (871) In addition to not getting all the producers in, marketing agencies were ineffective because of competition from districts outside that did not have such organizations. This affected their ability to maintain satisfactory prices. Any agency of that kind would have to have fully 90% of production to become effective. I would say that the present Code should have at least that percentage in it to be really effective.

(874) Prior to the enactment of the present Act and since the NRA code, labor relations in Ohio have been subject to agreement with the United Mine Workers. These relations have been pleasant and happy.

By the Court:

(875) It does not cost more per ton to mine the selected grades than the run-of-mine coal. The cost of screening is very, very slight. The only difference in the cost of prepared as against mine-run is the additional cost of screening and possibly picking the prepared coal a little more carefully than you would mine-run which might be going to an industrial consumer who was not quite so particular.

By Mr. Whitney:

I do not know of any company which I honestly believe [fol. 490] makes a net profit of more than 13½% of its sales price.

(876) Redirect examination.

By Mr. Critchlow:

I have not the exact figures on what percent of capacity the mines in Ohio have been operating during the period of January 1 of this year, but I would estimate an average

of about 60%. Costs per ton decrease as mines run more nearly up to capacity.

(879) A producer in Ohio that was on a wage cost 25% below its competitors could get sufficient business to run his mines 100%. If he ran his mines 100% as against 60% in Ohio, the saving in cost would be, varying with the mine, somewhere between 20¢ and 27¢. By that process alone he would save that much in his cost, plus whatever he might save through his lower wage scale. In that case, the saving in labor costs would be a reduction of 25% of about 65% of total production cost.

(881) Competitive rivalry between states with reference to the production of coal is such that in my judgment it would be almost impossible to bring about interstate compacts in the coal industry.

(882) When we screen coal we make slack as well as larger sizes. Run-of-mine coal when screened comes out in different larger sizes and different smaller sizes, or slack. The cost of screening coal per ton would depend entirely [fol. 491] upon the character of equipment for screening but it is a very small item of cost. I would say it never would cost in most fields in excess of 2¢ to 5¢ a ton.

[fol. 492] (906) HARRY L. FINDLAY, a witness heretofore called, resumed the stand and testified further as follows:

Direct examination resumed.

By Mr. Critchlow:

I have been over the testimony which I gave before the subcommittee of the Committee on Ways and Means of the House of Representatives on House Resolution 8479 in June of this year. The testimony I then gave with respect to whether or not the Act would increase prices was given with reference to NRA code prices, as is indicated by the entire line of testimony given at that time.

[fol. 493] (883) GEORGE W. REED, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Critchlow:

I am a director and vice-president of the Peabody Coal Company. I have been in the coal business 33 years in sales and distribution. I have been with the Peabody Coal Company for 19 years. The Peabody Coal Company directly and through its subsidiaries has coal mines in Oklahoma, Illinois, Indiana, Kentucky and West Virginia, the large interests being in Illinois.

(884) I am most familiar with the producing areas in the middle west but familiar to some degree with those in the eastern and southern states. Our Illinois coal is sold largely in Illinois, Iowa and Missouri. We do ship quantities every year to 13 other states, as far south as Louisiana, the Dakotas, Kansas, Nebraska and intermediate states. In these markets, our coal comes into competition with coal from Alabama, Tennessee, Virginia, Kentucky, West Virginia, Pennsylvania, Ohio, Indiana, Missouri, Iowa, Arkansas, Kansas, Oklahoma, Wyoming, Colorado and North Dakota.

I am familiar with the general practice in the coal industry relative to the way orders are solicited and shipments are made. (885) Distress coal is a term applied to coal which may be shipped unconsigned, which has reached its [fol. 494] destination about to accrue demurrage or actually accruing demurrage, or coal which is held unbilled on mine tracks with other coal which, together, makes an amount which, if held, will prevent or make it impossible to receive any more empty cars under present-day railroad regulations. All of us selling coal do our utmost to sell a balanced tonnage, meaning by that that at the mines which separate their coal into different sizes we will have a certain percentage of lump, another percentage of egg, another percentage of furnace, and another percentage of slack. We seldom find a balanced demand for all those sizes, so that in the operation of a mine producing screened sizes we accumulate more of one size than another at different times of the year. That comes about because we obligate ourselves to make shipment and delivery of certain sizes before the coal is mined. If our mine tracks were filled and we had no obligations to ship the next day we would not sacrifice any of these sizes in order to secure cars on which to operate the

next day. (886) Coal is not mined in areas with which I am familiar at railroad-shipping mines before railroad cars are received at the tipple to receive the coal. We have had quite a growth in this country in the last two years of small mines served by motor trucks. I know of no other classes of mines than mines served by railroads and by motor trucks.

In the period from 1923 to 1933, production in Illinois dropped from 78,000,000 tons to 35,000,000. The 1933 pro-
[fol. 495] duction was 45% of the 1923 production. The entire production of the United States in 1933 was 60% of the entire production of 1923.

(887) Coal from states other than Illinois is shipped into Illinois for consumption. The drop in production in Illinois during the period referred to was caused by lower prices made by competing districts. Our production is determined entirely by the amount of coal which the producers operating the Illinois mines can sell. When the prices and transportation charges together of Illinois coal are higher relatively, based on value, than the mine prices and transportation charges of competing coals, Illinois does not get any business. During that 10 year period there has been constant reduction in mine prices in Illinois. The drop in mine realization price for Illinois from $2.50 in 1923 to $1.46 in 1933 (as illustrated by Defendants' Exhibit No. 23) reduced the number of mines in operation in Illinois from 374 to 159, with about the same number of days of operation. It materially reduced the number of companies producing coal during that period. The few who were able to survive were those who were fortunate in having financial resources or being in a position to secure financial help. (888) Those of us who own more than one mine have concentrated our operations so as to get the lowest possible cost. Many of us have made heavy capital investments to secure lower costs and to be able to ship a better value coal. [fol. 496] (889) The number of mines was reduced for two reasons. Most of the producers either went into bankruptcy or closed before they reached that stage. Others of the closed mines are the property of companies still in existence and were closed so as to concentrate the production at other mines. The number of mine workers in Illinois has been reduced from 90,000 to 30,000 in that period. The

rates of pay, daily, and the yearly earnings of the Illinois miners have been materially reduced.

Illinois has worked under agreements with organizations of employees since 1897. I do not recall an attempt to operate outside of an agreement with the mine workers' organization in the last 20 years. During the period 1923 to 1933 we had two strikes. There was a suspension from April 1 to October 1 in 1927. (890) There was a suspension from April 1 to August 9, in 1932. There was one in the last week in September, 1935. The suspension in 1927 affected all the mines in Illinois. I do not recall that in that period there was any mining operation in Illinois. During that period the Peabody Coal Company was under contract to ship coal outside the State of Illinois and I assume that some, if not all, the other producers also had obligations to ship. During the suspension we did not ship the coal on which our obligation rested. The cause of the strike was a difference of opinion between representatives of the producers and the representatives of the mine work-[fol. 497] ers (891) as to whether the coal industry of Illinois could go any further on the wage scale which we had then had for five years. The basic wage scale was $7.50 per day. Mining operations were resumed on the first day of October on the $7.50 wage scale with the understanding that starting immediately thereafter or certainly not later than the next spring we were to try to negotiate new wage scales. We did reach an agreement in either July or August of 1928 which provided for a basic wage scale of $6.10 per day.

The production of Illinois in 1928 was 54,284,000 tons. In 1923 it was 78,616,000 tons. (892) The production in 1933 was between 35,000,000 and 36,000,000 tons. That tonnage was lost by Illinois because of inability to meet the prices made by competing districts. The $6.10 wage scale was maintained until April 1, 1932. After a suspension between April 1 and August 9 an agreement was reached for $5 per day as the basic wage scale. My recollection of the period of that suspension is that some of the stripping mines operated through those four or five months. S-ripping operation is one which mines its coal with a large shovel by stripping the dirt and rock above the stratum of coal and then picking up the coal and loading it into railroad cars with a steam or electric shovel. (893) In 1932, when that strike occurred, my company had contracts to

ship coal to points outside the State of Illinois. We did not make the shipments of the particular coal under con- [fol. 498] tract nor of coal produced in the state of Illinois. We got the coal with which to fill those contracts in other states. That coal did not apply on those contracts. Our contracts carry a clause which relieves us of the obligation to ship when the mines are closed by differences with employees. In most cases the people to whom we have been shipping Illinois coal under contract will ask us to secure for them supplies from other states during the periods when our mines are not in operation. At that time we secured most of the coal from Kentucky.

The Peabody Coal Company has a two-thirds ownership in a coal company which operates mines in Harlan County, Kentucky. (894) I have never been able to ascertain definitely the wages paid in operations in Kentucky, except one or two. My impression has been always that the wages we have paid in Illinois since 1923 were higher than the generally paid in Kentucky. I know that the wages paid at the Peabody Coal Company mines in Illinois have been higher than those paid by the Black Mountain Corporation, which is the subsidiary in which we have an interest, at its operations in Harlan County for the last 7 or 8 years, and maybe 10 years. During the period from 1924 to 1927 the wage scale in Illinois was $7.50 per day. The Black Mountain Corporation paid tracklayers, which is the basic in Illinois, from March 1, 1924, to February 16, 1931, $5, so that during the three years 1924 to 1927 we were paying $2.50 per day less in Harlan County than we were in Illinois [fol. 499] for the same class of labor. Between February 16, 1931 and May 1, 1932, the Black Mountain Corporation paid for the same class of labor $4.80, from (895) May 1, 1932 to August 1, 1933, $4 per day. In Illinois we paid $7.50 until July or August of 1928 and $6.10 from that time until August 9, 1932.

[There was offered and received in evidence as Plaintiff's Exhibit No. 61 a table entitled "Strikes, Suspensions and Lockouts," from Minerals Year Book, 1932-33.]

[fol. 500] (909) GEORGE W. REED, a witness heretofore called and sworn on behalf of defendants, resumed the stand and further testified, as follows:

Direct examination resumed.

By Mr. Critchlow:

I should like to make a correction in two statements which I made yesterday from memory. First, the average number of working days in Illinois mines in 1923 was the same as it was in 1934, not 1933. The average number of working days in 1933 was 131. (910) The correct figures as to the number of mine workers employed was 99,714 for 1923 and 40,660 for 1933.

In 1934, the annual tonnage produced by the Peabody Coal Company was 8,064,000 tons. The smaller the number of days of operation per week the higher is the production cost per ton. The extent to which it will be higher will vary with every different method of mining. There is not so much variation in two mines of the same size with the same method of mining. I would say that in Illinois the average mine is one of a production of 2,000 tons per day. In such a mine, the difference in production cost between operating 3 days a week and 6 days a week would be between 20¢ and 25¢ per ton. (911) Because of the desire to escape the cost of these idle days, there is quite an incentive to any coal producer to move tonnage. If I have been able to sell sufficient coal to operate a mine 3 days per week, I can afford to sell the production for the remaining [fol. 501] 3 days for considerably less money than I must have for the foundation tonnage which is produced in the first 3 days. The tendency is in fixing price to attempt to get total capacity contracted for even at a lower price.

The strikes or suspensions which took place in 1927 and 1932 in Illinois materially affected the amount of coal shipped from mines in western Kentucky.

(913) [There were offered and received in evidence as Defendants' Exhibit No. 25—a chart showing graphically tons of coal shipped from Illinois and from western Kentucky; and as Defendants' Exhibit No. 26—a chart showing coal so shipped in percentages.]

(914) These two charts were prepared by me or under my direction. The figures for the Illinois production were taken from the reports of the Department of Mines and Minerals of the State of Illinois and the tonnages for west-

ern Kentucky were taken from the reports of the United States Bureau of Mines.

(916) Coals produced by the Peabody Coal Company and its subsidiaries move rather generally from the Rocky Mountains to the Atlantic Ocean. We compete in all of that territory. Illinois coal does not move east of Indiana.

(917) Since I have been connected with the coal industry there have been stabilizing influences exerted on the coal industry. On two different occasions, the Federal Govern-
[fol. 502] ment took action which stabilized the industry for short periods. The only other stabilizing influence I have ever known on the industry was the organization of mine workers.

(918) I regard wage cutting as an unfair method of competition.

(918-920) [There were stipulated into the record by Mr. Whitney and Mr. Critchlow out of the Statistical Abstract, that in 1923 there was an average wage for labor in all manufacturing industries in Illinois of $27.07 per week, and in 1933 of $18.28 per week. There was also stipulated into the record the following statement from "Coal in 1927" by the Bureau of Mines:

"The restriction in the union districts, therefore, was counteracted by an expansion of mining in the two largest producing states south of the Ohio which had easiest access to the markets normally served by the northern states. While this expansion, measured in tons, was not sufficient to keep production at the high level of the early months, still it was adequate to supply amply all current demands, and between April and October only 13,100,000 tons was withdrawn from storage."]

[fol. 503] (1136) GEORGE REED, recalled as a witness on behalf of the defendants, testified further as follows:

Further direct examination.

By Mr. Critchlow:

There is a wide distinction between wage reductions secured by agreement between groups of employers and groups of employees, and wage cutting by an individual

operator to secure an advantage against his competitors. When such wage cutting is practiced secretly, as often it is, I think it is more unfair than the practice of giving rebates. The money involved to secure the advantage through wage cutting is furnished by the employees. The money involved to secure the advantage through the giving of rebates is furnished by the employer. (1137) I stated yesterday that outside of the two instances in which the Federal Government had regulated this industry I had never known of any other stabilizing influence than the mine workers' organization. Through dealing with the mine workers' organization, all Illinois coal producers have exactly the same wage scale for men who are paid by the day, and all have definitely related wage scales for men who are paid on a piece-work basis. That gives stability of wages and stability of costs. Any Illinois producer can ascertain the cost of production of every other Illinois producer. Illinois has been working under agreement with the mine workers' organization since 1897, and I know of no operations outside of those agreements in the last 20 years.

[fol. 504] (1138) Further cross-examination.

By Mr. Whitney:

I would say that periodic strikes are not a stabilizing influence if you mean by periodic strikes those that happen every few weeks or months or something like that. I cannot say that a strike is a stabilizing influence in any industry.

Further redirect examination.

By Mr. Critchlow:

In Illinois we had a strike in 1922, another in 1927 and another in 1932. Those were all at a time when the wage agreements that had been existing came to an end or had expired. (1139) The strike was the result of a failure of the employers and the employees to agree upon the terms of renewal. Generally, we do not have strikes during the period of the wage agreements. The operators and the mine workers' organization have set up boards of arbitration to which all differences are referred.

[fol. 505] (1239) GEORGE REED, a witness heretofore called on behalf of defendants, was recalled and further testified as follows:

Direct examination resumed.

By Mr. Critchlow:

Wage agreements arrived at by collective bargaining, in addition to fixing rates of pay by the day and for piecework also provide for maximum hours per day and week. In the organized districts the number of hours per day and days per week prior to October 2, 1933, were 8 hours and 6 days. In the unorganized districts employees were working 6 days per week and generally longer hours than 8 per day. (1240) After October 2, 1933 the hours per day were 8 and the days per week were 5. After April 1, 1934 the hours per day were 7 and the days per week were 5. In the districts which were unorganized after October 2, 1933 the hours observed were the same as in the organized districts. That was during the period of the N.R.A. The effect of the shorter work day and the shorter work week, taking 35 hours per week and comparing it with 48 hours, is that there is an increase in the cost per ton (1241) of production, even though the hourly rate of the men paid by the day and the rate paid on a piecework basis are the same. There are two classes of miners, those who, prior to the reduction in the number of hours per week, had sufficient business to keep their mines in full time operation [fol. 506] throughout the year—which were in the minority, although there are a great many mines, particularly those furnishing coal for domestic purposes, that have during certain months sufficient business to give them full time operation—and, second, mines not having sufficient business for full time operation. In the case of the mines having full time operation a reduction in the number of hours per week had the effect of proportionately reducing the production of the mines, which in turn increased cost of production because the fixed charges remained the same. In the case of the other mines, assuming that there were sufficient business to operate 3 days on an 8-hour basis, when the hours were reduced to 7 hours a day it was necessary to operate the mines more days per month in order to produce the same tonnage. It has been our experience and that of

every other operator who has watched it that there are two hours in each day which are not as productive as the other hours, namely the opening hour and the closing hour. Under the 8-hour day limitation we had 6 full production hours and 2 part production hours. Under the 7-hour day (1242) we have 5 full production hours and the same 2 part production hours. That has the effect of increasing cost per ton when we work the shorter day.

Our Company, through a subsidiary, the Black Mountain Corporation, operates two mines in Harlan County, Kentucky. There have been three companies, including our own, operating mines in Harlan County which produce coal [fol. 507] which is quite similar. We found in 1931 that one of the other companies was paying wages less than we were paying, (1243) working men longer hours than we were, and making prices lower than we could make with any hope of breaking even. That company in hundreds of instances sold its coal to people who had been handling our coal, at prices lower than we were offering. The result was that in an effort to reduce our losses we tried to concentrate our production and one mine was closed entirely through 1932 and until the end of August, 1933. Our production in that space of time dropped from 1,100,000 tons to 465,000 tons, and the company lost in that 19-month period $333,000. The other company I have referred to continued to operate. Its tonnage increased. (1244) The difference between the wages paid by our company and our competitor, in the case of some classes of employees, meant a difference (1245) as between $4 for 8 or 9 hours and $2 for 13 hours, as between $3.50 for 8 and 9 hours and $2 for 13 hours, and as between $2.50 for 8 and 9 hours and $1.50 for 13 hours. In the case of the mining rate there was a difference of between 45 cents and 50 cents in the case of our properties, and 30 cents in the case of theirs.

Demurrage rates charged by railroad companies on cars containing distress coal reduces the price by the amount of demurrage paid so far as the man to whom the coal is sold is concerned. Any demurrage or reconsigning charge that [fol. 508] may have accrued between the time when the car left the mine and the time when it was delivered to the ultimate consignee at destination is assumed by the man who owns the coal at the time those charges accrue. The regulations provide for a reconsigning charge of $2.70 for a re-

consignment during the first 24 hours after arrival, and of $6.30 per car for reconsignment subsequent to the first 24 hours after arrival. The demurrage regulations provide for a charge of $2 per day for the first four days after 24 hours following 7 a. m. immediately following the arrival of the car, and $5 per day for the days thereafter. (1246) If a car is held five days the reconsignment charge would be $6.30 and the demurrage charge would be $13, or a total of $19.30, which on a 50-ton car would be roughly 38 cents a ton. The effect of that is that the shipper is willing to sacrifice the coal beyond the price he would make if those charges were not accruing.

Cross-examination.

By Mr. Whitney:

Our mine in Kentucky concerning which I testified was not then unionized but I think the rates which I testified were paid by the competitor mine were lower than the general level paid at that time in Kentucky.

[fol. 509] (920) C. W. Watson, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Critchlow:

My full name is C. W. Watson; residence, Fairmount, West Virginia; business address, Cincinnati, Ohio, and Fleming, Kentucky. I am 71. I started in the coal business about 1875 (921) in northern West Virginia. I opened the first mine I had any personal interest in in 1885. I became an executive officer of various coal companies in 1896. About 1902 I became president of the Consolidation Coal Company and was chairman of the board for 25 years. That company mined and shipped coal from the states of Maryland, West Virginia, Pennsylvania, Kentucky and Virginia. In 1911 or 1912 I became chairman of the board of Elkhorn Fuel Company. That company went into receivership in 1931. I was made receiver. The first of November of this

year I was made trustee under Section 77B. That company produced in 1934 about 1,500,000 tons from its own mines and about 1,250,000 from its lessees. I am also a director in other companies that lease land in Kentucky aggregating some 300,000 acres with a production between 3,000,000 and 4,000,000 tons. I have lived in West Virginia all my life. I was president or chairman of the board of Consolidation about 25 years. The annual production of that company varies every year. I think the highest year while I [fol. 510] was an officer its production was in the neighborhood of 17,000,000 tons. I was Senator from West Virginia for about three and a half years, filling an unexpired term.

(922) I am reasonably familiar with conditions at the mines in the various states I have referred to. To a reasonable extent I am familiar with market conditions and have been for many years, in the various consuming markets throughout the country. I am particularly familiar with production conditions in Kentucky. I concur in the view that there is a great deal of surplus capacity in the developed mines of the country and has been for many years. I agree with prior testimony that prior to 1923 the capacity of these producing mines to actually produce and ship was limited by the fact that the railroads were not adequately equipped to handle all the coal that could be produced. (923) It is true that about 1923 the railroads were in shape to handle the production of the mines generally. Throughout all the coal producing areas of the country there was very keen competition to get orders and sell coal. There was keen competition between the producers of every state and also between producing areas. For instance, the area south of the Ohio and Potomac Rivers was in competition with the producing areas north of those rivers. Within those producing areas there was unlimited competition among the operators. Several things happened during 1924, 1925 and 1926 to give very good work and fairly good prices to Kentucky and southern West Virginia. Those [fol. 511] were suspensions and certain fields going from union to non-union. (924) About 1925 wages began to be reduced all over the south, generally in Kentucky, and gradually receded in various mines until 1933, when they took an upturn. When I was appointed receiver, I believe our base wage rate at the mines was $2.80 lower than other mines. The Jacksonville wage agreement went into the so-

called competitive states in 1924. About that same time, the so-called Baltimore agreement went into effect in northern West Virginia. At that time Kentucky was non-union. There was a gradual trend downward in wages in Kentucky up until 1933. I should say that that wage reduction gave competitive advantage to the southern fields over the northern fields compared with what they had had before that time. (925) The production from those fields increased during the period from 1924 to 1927.

Prices usually follow wages. Wages and prices were going down and production was going up in the southern fields from 1924 to 1927. At various times from 1925 to 1927 different fields in the north went non-union. From that time on, everybody was scrambling for a share in the markets where coal is principally bought and sold. Conditions in 1931 and 1932 were very bad. (926) So bad that the Governor of Kentucky called meetings of governors of other states in an effort to get the states together to exercise their police power to keep coal from being loaded at the mines. The working time was short and wages were extremely low. Practically all the companies [fol. 512] in eastern Kentucky were losing money. Living conditions were bad.

(927) In 1931, 1932 and 1933, prior to the NRA code the working time in Kentucky was not over an average of 3 or 4 days—3½ days, probably. The lowest wages I recall that the Elkhorn Company paid were $2.80 base rate. There were no tangible results from the conferences I have referred to. I believe after that the Governor of West Virginia asked the National Coal Association to take the matter up and report a plan. After several weeks work they did report a plan which resulted in the formation of some selling agencies, the Appalachian being the most outstanding example. (928) The formation of the Appalachian Company was helpful in that territory. It made conditions substantially better, temporarily.

These conditions had a very bad effect on the financial condition of the coal companies. Many of them were in receivership. Under the National Industrial Recovery Act, for several months it had a very good effect. Better wages were paid and many companies under that code went from red to black. Now, prices have slipped very much. If we take into consideration the increase in wages

since 1933, the prices of screenings or slack coal, are about the same. (929) It is today being sold about as low as it was then. Appalachian Coals only operated a short time until the code came in. Operations were carried on under the code after that. Appalachian began operating in June, [fol. 513] 1933. The code came in the same year. I do not think the selling agency formed under the Appalachian plan would have brought the industry out of the condition it was in, and kept it out.

[fol. 514] (1157) C. W. WATSON, heretofore called as a witness on behalf of the defendants, was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

(1158) By Mr. Whitney:

It was not the policy of the companies with which I have been associated, that is, the Consolidation Coal Company and the Elkhorn, at any time or to any degree to defraud their men of their wages in the absence of a checkweighman. (1159) We have had some cases where men employed by the company in charge of those things broke the policy of the company and did in fact defraud the men. I would say they were rare. What I would say concerning the districts concerning which I have previously testified in this respect would be hearsay. I have heard all kinds of stories. The general belief is that it did occur quite often. I have no proof of it. I do not think that it is the usual thing for the companies in my district to defraud the miners. Some of them do and some of them do not. Some were worse and probably some better than my companies. (1160) I do not think it was the usual custom.

The companies with which I have been connected never had any practice of evicting people from the company houses. So far as operators in my district generally, these evictions occurred generally in time of strike, which is war on both sides. I would say that otherwise they would very rarely occur.

[fol. 515] Cross-examination.

By Mr. Critchlow:

(1161) In the non-union areas, in the past, the operators did not exactly welcome union activities. It was warfare. Both sides are guilty.

When there was a character of man that was objectionable to the operators he was generally discharged and evicted.

Since the operators were fighting unionism, if they found out that there was a man among the employees who was talking union and holding meetings to interest the men in union activities he was generally dismissed. (1162) In reference to companies I was connected with I know of no eviction cases. I had none personally when I was superintendent of mines. I hear of cases in other companies quite often and see it in the newspapers and a lot of it was in evidence before investigations, but personally I have never seen a man thrown out.

[fol. 516] (930) E. C. MAHAN, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Critchlow:

I live in Knoxville, Tennessee. I have lived there about 35 years. I am president of the Southern Coal & Coke Company, which is a selling organization, and also an executive officer in a number of operating companies, the total production of which is slightly under 2,000,000 tons a year. I have been engaged in the coal business 35 years, approximately. My activities are mainly directed toward the selling end. 16 mines are operated by the companies with which I am associated. They are located in eastern Kentucky and Tennessee. (931) I am reasonably familiar with the conditions in eastern Kentucky and Tennessee.

The coal produced from those mines is marketed in the areas ranging from Canada to Florida and not any further east than Ohio and not any farther west than the Dakotas. It is a section more or less shaped like an hour glass, run-

ning north and south. I try to keep familiar with the conditions of the markets in those areas where our coal is sold. In a general way, the market began to weaken, pretty substantially, as I recall, in 1923, due to the fact that for the first time since I had been in the coal business we had approximately a full car supply. Some time before the sign-
[fol. 517] ing of the so-called Jacksonville agreement by the central competitive field wages in the south had been reduced. Prices had been reduced. After the Jacksonville agreement had been signed by the northern people there was a continuous reduction of prices down south (932) and a reduction in wages and a substantial increase in the southern output, until it finally resulted in the central competitive field going on a non-union basis. Generally speaking, I think that was accomplished by the central competitive field in 1927. That was a result of the economic pressure exerted by the south in territories where they shipped coal. The competitive field had a $7.50 a day base wage scale. Our wage scale was substantially less and was reduced from time to time as it became necessary. The net result was that the central competitive field was forced, practically in self-defense, to get themselves in a position where they could compete with us. In a very general way there was perhaps some profit made by the southern field during that period.

In 1926, as I recall, the English strike was a very substantial assistance to the southern fields—in fact all fields —and the effect of that lasted through a portion of 1927. But after 1927 the conditions became increasingly bad and kept getting worse and worse until the code was put into effect in 1933. Prices were reduced very substantially. (933) As prices were reduced, wages were reduced and conditions became so bad that it was practicaly a case of where an operator to get business would go and make almost any [fol. 518] price. Then he would go back and simply tell his labor the wage scale they would have to operate under in order for him to load that coal. Usually it reduced the wage scale about 10¢ and reduced the prices about 20¢. By 1933 we had a very distressing situation, very low wages and practically everybody in the business hanging on by their eyelashes. Working time was very poor, ranging in a great many cases as low as a day a week, probably averaging somewhere in the neighborhood of 2 to 3 days a week.

The experience under the NRA code was very satisfactory during at least the first year of its operation and resulted in great improvement in wages and improvement in the realization to the operators, and was of immense assistance in every way to the industry, in my opinion.

Cross-examination.

By Mr. Whitney:

(934) In 1932 we were forced to cut wages. That wage cutting prevailed all along from 1923 up to and including 1933. I felt at that time that it was very important to continue to cut wages all we pleased. I felt the government should not regulate the coal industry. I did not feel like I wanted to be regulated. (935) When I testified before the Senate Committee in May, 1932 that:

"There is no real reason that we can see why the coal industry should be singled out for regulation. It is probably in no worse condition than a number of other industries, and certainly is not in as bad shape as some. If a start is made in regulating the coal industry, it will likely [fol. 519] be only a question of time until lumber, steel, copper, and various other industries are also regulated, thereby abandoning entirely the principles of government on which this nation was founded and has been developed."

I do not know just how far I would go in saying that I have changed my mind about those things, but, so far as this coal regulation is concerned, I am frank to say that I have changed my mind very substantially with reference to what I think is necessary in order for this industry to be able to conduct its affairs in anything like an orderly manner. I am considering only coal. I do not know enough about lumber, steel, copper and other industries to feel justified in expressing an opinion about them. (936) I was against the 1932 bill. We all do the best we can in saying what we think will defeat bills. At the same time we try to tell the truth, too. I have no objection to doing what I can to win this case. At the same time I want to tell the truth.

I do not want the domination of the United Mine Workers of America. I understand somewhere around 90% of the mine employees in this country are today represented by the United Mine Workers of America. (937) If there are

any of the 26 districts under the Act which have a majority of workers represented by some organization other than the United Mine Workers of America I do not know of them.

When I told the Congress in 1932 that:

"We believe it would mean the domination of the coal industry by the United Mine Workers of America to pass the Davis-Kelly bill, and we do not feel that the record of [fol. 520] the United Mine Workers of America in the past 20 years, in the matter of collective bargaining, as practiced by that organization, has been such as to justify this nation in legislating them into complete domination of the coal industry."

I was saying it because I thought it was true. I thought it would be injurious to the nation to have the coal industry dominated by the United Mine Workers of America. I do not now feel about it as I did at that time. I do not relish the idea of having the United Mine Workers control this business (938) but I do not see any way for stabilization of this industry without it. By stabilization, I mean that if this industry is to be conducted in anything like an orderly manner, if a living wage is to be paid and some return gotten on capital invested in the industry, I do not see any way out of it at the present time except that wages be stabilized and I do not see any way at the present time to do that other than through the United Mine Workers.

I do not believe the condition of the industry is any worse now than it was in May, 1932, but I believe it is about as bad. (939) The average of all shipments my company gets for coal today is roughly $1.80. The average we received in May, 1932, was roughly $1.10. The average wages paid by us today to the miners, that is, the base rate in the so-called Appalachian region, is $5.10. In May, 1932 there was no base rate, the average rate being paid was I would say roughly $2.50.

(940) I hope that prices will be increased by the Act. [fol. 521] If they are that will result in an increased use of gas and hydro-electricity to a certain extent. I still feel as I did in 1932 when I said:

"Frankly speaking, personally, and not as a representative of the industry, if there was some way that I could

unload my troubles on the Federal Government, I would be more than delighted to do so."

(941) Redirect examination.

By Mr. Critchlow:

In the 35 years I have been in the coal business I have given pretty careful attention to the marketing end of the business. I have very definitely made a study, or tried to, of some solution of the industry's problems. I served during that period as president of the National Coal Association for two and a half years and subsequently as chairman of the subcommittee that considered all the plans that were suggested as a solution of the industry's problem. Out of that committee came the suggestion which subsequently was involved in Appalachian Coals, Incorporated. (942) I saw that tried out and, in my opinion, it was unworkable. After the NRA code was formed—frankly I was very much opposed to the code and went into it only because I had to, because I had been definitely opposed to any sort of governmental control in any way—but after the code went into operation and I saw the results and the possibilities of what could be done in the industry if it had a code with some enforcement in it, I became convinced that the industry could never get to a profitable operation [fol. 522] unless it had Federal control. I have seen state control tried to a certain extent. Some effort was made on the part of the governors to get together. After I saw the results of the first year of the operations of the code and saw how we had switched from the low living conditions of our miners to a greatly improved condition and I had seen red ink on our balance sheets switch to black ink in a great many cases, it was very evident that if some such program as the code could be continued and some enforcement put in there to make the code really operative, we had reached a solution of the industry's problems. That constituted the background that caused me to change. (943) Frankly, I think this bill we have at the present time is nothing more nor less than the code, with some teeth put into it for enforcement, and my opinion is that if it can be given a fair trial and the operators would give it the same sort of trial that they gave the NRA code, it would certainly go a very long way toward solving the problems of this industry.

Recross-examination.

By Mr. Whitney:

I think the tax provision is one of the teeth of the statute that were not in the NRA code.

[fol. 523] (950) W. P. Tams, Jr., a witness called and sworn on behalf of defendants, testified as follows:

Direct examination.

By Mr. Critchlow:

I live in Tams, West Virginia. I have lived there 27 years. I am in the business of producing and selling coal (951) and have been for 31 years in southern West Virginia Smokeless field, the specific district being Winding Gulf. The southern Smokeless field as a whole embraces the Carter Coal Company and our operations, both. The name of my company is the Gulf Smokeless Coal Company. I am president and have been for 24 years. Our usual production varies from between 700,000 and 1,100,000 tons annually. I am familiar with conditions existing in that field in connection with the mining and production of coal. Our coal is marketed in the same areas that the coal of smokeless fields generally is marketed. I am reasonably familiar with marketing conditions in the various markets in which that coal is marketed. I am not as completely familiar, however, as a salesman would be.

(952) In 1923 our section was extremely prosperous as the aftermath of the organized field strike in 1922 which had removed from the markets a large amount of coal, while our section, along with other non-union sections, were operating. That effect of the strike of 1922 continued over in 1923 and made 1923 a year in which a high price was obtained by everybody for coal. Starting in the fall of that [fol. 524] year, that condition changed, storage in the markets began to fill up and in 1924 we started into a very serious decline and our company lost money. In 1925 the anthracite fields went on strike and that brought us back to a temporary condition of prosperity, that strike lasting until the early spring of 1926. When that strike was set-

tled we again began to decline in price rapidly until the summer of 1926 when the British coal strike occurred and, our fields being close to tidewater, we supplied a great deal of coal to the British market. That had the effect of raising prices very materially. That strike was settled in January of 1927. In 1927 and thereafter our prices declined very steadily although they were helped out in 1927 somewhat by the efforts of certain northern fields to become non-union. Those efforts had gone on in 1925, 1926 and 1927. Our prices per ton for sizes such as slack used industrially (953) went down and we tried to meet the situation by installing screens in such mines as had not up to that time installed screens, so as to make the more remunerative sizes, such as lump and egg. Mines which already had screens increased the sizes that they made. That is to say, they began to make stove, nut and pea coal. All those efforts helped to stem the tide against us, and we were fairly successful but not completely so until 1930. After that the northern fields having become non-union and having reduced wage scales, we had to reduce our prices in order to operate, and after reducing prices we had to begin [fol. 525] to cut wages so as to make the costs equal to prices at which we sold coal. Once started, that continued in 1931 and 1932 until our final wage cut was made in early 1933, going in our district as I recall it to $3.20 per day base rate, compared to a rate that had been $4.64 per day, and which during the boom time of 1922 and 1923 had been $7.68. That brought us down to the early summer of 1933, when the NIRA was passed.

I think that production somewhat increased in the smokeless coal field from 1923 until 1929-1930. The production went down until 1933, I think, and picked up somewhat in 1934. (954) In my opinion, the cause for this competitive condition forcing down prices and wages is too much productive capacity of the mines of the United States. There are several factors in the nature of the industry that have a tendency to cause that overproductive capacity to always be present. In the first place, coal mines are on leased property with the obligation on the operating company to pay a minimum annual rental or royalty, whether it produces coal or not. If the production is not kept up and if royalty payments stop, all of the plant and investment of the operating company is lost to it and becomes the prop-

erty of the land-owning company. In the second place, the coal industry has a very big percentage of its operating cost as labor cost, which makes it somewhat different from other sorts of businesses. You cannot pick up a coal mine from one spot and move it to another like you can in an investment in a mill where you can abandon the mill build-
[fol. 526] ing only and move somewhere else. You cannot pick your coal mine up and move it to a more favorable market. In the Appalachian section generally when you open a mine you have to build a town, because the mine is opened in communities that have no towns and no villages, no place for the working people to live. The mining operation has to build that town.

There is a cost in keeping a mine idle. If you expect again to operate the mine you have to keep up the equipment, you have to keep the mine pumped out as to water, and you must maintain your town, you must furnish heat, light and water, you must police the town, you must collect garbage and trash and carry it away, all the expenses of a small community; and you must pay the royalty to the landlord if the mine is on leased property, and your taxes go right along. If a mining plant located on leased property is taken by the owner of the property upon default in royalty that does not mean that the mine then is out of the market. Some other optimist comes along and leases the property and starts to work operating it. He gets the plant on the property without expense—with a reduced capital expenditure. If such a mine is taken over by the mortgagee there is the same incentive to use the land for the only purpose for which it can be used, to try to make something out of the coal that is in the ground, and to put the coal on the market. (956) We have a mine in our particular district that I think has been operated in the last 15 years by five different companies, each of which has gone into successive bankruptcy.

[fol. 527] The coal produced in our district we call smokeless coal. That is low volatile coal. That coal is particularly competitive with central Pennsylvania which is a similar coal. Its prepared sizes to a limited extent compete with anthracite coal. The coal competes with all the other coal-producing districts east of the Mississippi River generally speaking.

(957) From October 1, 1933, until the end of 1934 under the NRA code in the smokeless field, we had an immediate improvement in the price obtained for coal and in the wages paid to the men. That improvement remained until December, 1934. At that time, many shippers became doubtful of the Government's ability or willingness to enforce the code and it became believed in the smokeless coal fields that certain operators were so sure of their belief that they would not be successfully prosecuted that they began to sell at prices below code prices. From that time on, the code effect dropped and we ceased to get the benefits until at the decision in May in the Schechter case, the whole thing collapsed so far as price regulation went. Since that time the price of slack coal particularly has very materially declined below the prices fixed by the code. I should say they declined anywhere from 30¢ to 60¢ per ton depending upon how eager the operator who was selling was for full-time running. The cost increases very materially on part-time running. I think I recall that our company had a difference in cost between December and January of 32¢ per ton due to a tonnage change from 46,000 tons produced in one month to 69,000 tons produced in the other month. (958) [fol. 528] The average running time of the mines in our area in the early part of 1933 was probably 60%. I would not state that as an accurate fact but that is my impression.

Cross-examination.

By Mr. Whitney:

I think the average running time in August of 1935 in my district was probably 70%, approximately. There was an excessive productive capacity present in 1932. (959) I do not think we are losing as much business at the present time to other fuels as we were in 1932. That is not because prices are lower. I think people fixing to go to competing fuels since that time have largely gone to them. In other words, the opportunity to change has partly exhausted itself.

Operation at my mine has not been interrupted as a result of maintaining a non-union policy. In 1922 one out of four of my mines was laid up for ten days because of threats of violence made by men representing themselves as agents of the United Mine Workers of America. We

called the sheriff of the county to deputize an officer to police that particular job and protect the men. (960) That enabled production to be reopened and commerce again to flow. It might possibly have been also due to the obtaining at the same time of an injunction. I think the injunction came shortly after that. I do not remember the exact time.

When I testified in 1932 that:

[fol. 529] "It seems to us that while conditions are admittedly unsatisfactory in the coal business, yet compared to other businesses it can be said to be in better shape than steel, automobile plants, and other industries, which no one has yet proposed to regulate."

I meant regulation by the National Government. Today I believe regulation by the National Government is the only practical means to get out of our present difficulties. (961) Today I would be prepared in order to get out of our present difficulties to submit to "a bureaucracy compared to which the Interstate Commerce Commission would be a child alongside a giant" but in 1932 I was not. Conditions then were different. It is true as I said then that

"Each individual coal mine is a problem in itself, with conditions varying materially from mines immediately adjacent thereto."

I thought then that this meant that:

"There are over 7,000 mines in the United States, and it would require literally hundreds of commissioners and thousands of subordinate employees to even accumulate the data on which to base decisions by the proposed commission."

but the NRA experience would seem to indicate it can be done with much less. The NRA worked as long as the people subject to it thought it was a constitutional law and that it could and would be enforced. When they ceased to believe that it ceased to work. I should say that from 10% to 20% in our section began to doubt it in December of 1934 and naturally 100% knew it was not constitutional in May, 1935. (962) The proportion of from 10% to 20% seemed to be sufficient to undermine the code in our district.

[fol. 530] (966) Redirect examination.

By Mr. Critchlow:

The injunction suit I previously mentioned in connection with some strike activities at one of our mines was in 1922 in a Federal Court. I think jurisdiction was based upon the fact that the mines in that section had individual contracts with the miners, and the court was asked to enjoin the United Mine Workers from interfering with those individual contracts.

(967) Recross-examination.

By Mr. Whitney:

The 1922 strike in the Winding Gulf subdistrict of the smokeless field, in one sore spot, lasted about ten days. In the New River section of the smokeless field it lasted considerably longer, but I do not remember exactly how long. The aggregate amount of days that the Tug River district has had strikes since 1923 would be negligible. New River has had more suspensions. It was organized in 1913 and remained organized until 1922, and as I recollect, it went non-union in the strike of 1922. My guess would be that the New River district has been tied up by strikes since 1923 altogether six weeks to two months. (968) The Pocahontas district has not been tied up by strikes at all since 1923, until the last strike of one week, pending this final settlement. With the exception of those five or six mines immediately around a little town called Sophia, which were sus- [fol. 531] pended about 10 days in 1922, I do not think the Winding Gulf district had any strikes.

[fol. 532] W. A. Richards, called as a witness on behalf of defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Critchlow:

(969) I am in the business of mining and selling bituminous coal. My operations are in district No. 7, which is the

Smokeless area of southern West Virginia and in the Williamson district which is in district No. 8. I came to the southern fields in November of 1924 as general manager of the Ashland Coal & Coke Company with mines in the Pocahontas field, district No. 7, and as general manager of the Pemberton Coal & Coke Company, with mines in the Winding Gulf district, in district No. 7, and as general manager of the mines of the Majestic Collieries Company in eastern Kentucky, in the Williamson field, district No. 8. In 1925 I became president of those companies. In 1931, with my father, I helped organize the Sovereign Pocahontas Company, which is a selling company for the output of those mines and the other mines in the Pocahontas, Winding Gulf and New River districts of the Smokeless field of West Virginia, or district No. 7 in the Act, and for other mines in the Virginia district and the Williamson district, which is in district No. 8 in the Act. I was a member of the code authority, chairman of the classification committee of that code authority, and (970) executive secretary of that code authority in charge of correlation of prices with other sub-
[fol. 533] divisions, under the NRA. I was a member and chairman of what was successively known as the Joint Market Committee of Division No. I which embraced districts No. 1 to No. 8 under this Act and which committee was late. known as the Market Subcommittee of the Administrative Advisory Committee, which embraced all divisions of the bituminous industry, which was changed in January to be the divisional market committee of division No. 1.

My activities have been directed to both production and sale. I am president of the Sovereign Pocahontas Company also. (971) The period since 1924 has been characterized by a decline in price, with the single exception of the effect on the mine realization in the Smokeless area produced by the continuous effect of the anthracite strike from September, 1925, to February, 1926, and then the Britian strike from about May 1, 1926 to November of 1926, and a threatened suspension in the central competitive field in 1927 which, over that period, gave us an artificial market. (972) During this period the trend in shipments was upward. Generally, the margins of profits of the producers were declining. Coal from that area is known as low-volatile coal. It is coal running from 15% in volatile content to

approximately 26% (973) and makes less smoke in combustion than does the general run of high-volatile coal. It has a little more volatile content than anthracite coal has and the three broad descriptions of coals are, therefore, based on that volatile content, anthracite being the lowest, [fol. 534] Smokeless coal coming next, and high volatile coal ranging from 28 on up to 40%. In general low volatile coal commands a higher price in the markets of the country than high-volatile coal with the exception of a few specific and small instances. By "small" I mean in tonnage. While markets were expanding and we had a coal of superior quality, margins of profits were declining because of the declining realizations for coal that it was possible to secure in the country. Naturally, the prices of Smokeless coal must be influenced by the market prices prevailing for equivalent grades of coal in the various consuming markets. To that extent it is affected by the competition of all fuels. In addition to that, it, like other producing districts, does not have what I would term a fair market. By a fair market I mean a market in which a willing seller meets a willing buyer (974) without advantage on either side. The nature of the industry, with its high inherent shutdown cost, the fact that a producer must supply coal to maintain his identity in the market, his reputation for being a dependable source of supply, and the fact that costs decrease in proportion to tonnage output, all contribute to make the market unfair.

Our decline in margin of profit had proceeded to a point where it became a matter of concern to the operators in the Smokeless district in the year 1924. At that time, the operators studied plans for merging their properties into larger corporate entities. They studied plans and put into [fol. 535] effect an open price filing bureau known as the Stover Smokeless Coal Bureau. They studied plans for the creation of a central selling agency. Mr. John L. Steinbugler, who is president of William C. Atwater & Company of New York City, in 1925 (975) advanced the plan of the central sales agency for the first time, and it was considered at length by the Smokeless producers. On advice of counsel that such an agency was illegal, the plan was abandoned, and in 1927 the producers took under consideration the creation of a merger of operating companies in all the Smokeless fields, and spent nearly a year in trying to effect

such a merger. In 1929 the Smokeless Coal Operators Association appointed a policy committee of one representative from each of the three major districts, Pocahontas, Winding Gulf and New River, to study the flow of Smokeless coals in the various markets, (976) and to aid in finding those factors that were detrimental to our progress, and in December 1931, the Smokeless producers joined with the producers generally all over the country in resurrecting Mr. Steinbugler's plan for a central selling agency, and, in common with other districts, set up committees to try and work out such plans and put them in effect. The Smokeless committee, of which I was a member, worked for three months in 1932 on such a plan, and was stopped by the test suit on the part of the Government on a similar plan in the Appalachian fields. When the Supreme Court, in March, 1933, held such a plan legal, the Smokeless committee again [fol. 536] went to work on such a plan and had arrived at a point where it felt it practical to try and organize, when the National Industrial Recovery Act was passed.

(977) [It was stipulated by Mr. Critchlow and Mr. Whitney that Mr. Richards would testify in substance the same thing Mr. Tams testified to in answer to the question "what was the condition of the industry down there in the Smokeless fields in 1932 and 1933?"]

I heard Mr. Carter's testimony about the Caretta mine where he claimed there was a discrimination under the code in the price fixed for that mine. (978) Mr. Carter voted for that price.

[fol. 537] (1143) W. A. Richards, a witness heretofore called on behalf of defendants, was recalled and testified further as follows:

Redirect examination.

By Mr. Critchlow:

Anthracite is produced almost entirely in Pennsylvania. It has a very low volatile content, 6% to 7%, and is very hard as compared with either high or low volatile bituminous coal. Its name in the trade is hard coal. It is somewhat higher in ash than the average high volatile bituminous coal and is distinctly higher in ash than the aver-

age low volatile bituminous coal. It is distributed chiefly in Pennsylvania, New Jersey and New York and has secondary markets in New England, parts of Canada, the central West, Maryland and the District of Columbia. Very little is distributed further south than the District of Columbia.

I was born and brought up in the anthracite region, (1144) Wilkes-Barre and Pottsville, Pennsylvania. My father was president of the Philadelphia and Reading Coal and Iron Company, the largest operating company at that time. I entered the coal industry permanently in 1919 as an engineer on the Minersville engineering corps of that corporation and was engaged as assistant to the chief engineer and as assistant to my father from 1919 to 1924, when I came south.

There is a difference in the conditions in which anthracite coal deposits are found and those in which bitumi- [fol. 538] nous coal deposits are found. The anthracite coal measures have been greatly disturbed by the regional metamorphism that produced anthracite coal, in which the original beds were devolatilized by this structural upheaval in those fields, so that they lie to a much greater extent in separate pitching veins, whereas bituminous coal lies in fairly horizontal strata.

Anthracite coal is very largely domestic fuel. It averages 60 or more per cent of domestic sizes, above the sizes of pea, and 40% or less of the so-called steam or fine sizes. Prices for anthracite coal range about $7 for the stove and chestnut grades at the mine, about $5 for the pea size from $3 to $3.25 for what is known as buckwheat No. 1, from $2 to $2.25 for buckwheat No. 2 or what is known as rice, and about $1.50 for barley or buckwheat No. 3. (1145) Prices for smokeless prepared coals range from $3.25 to $3.50 a ton in the case of the very large sizes, lump and egg, which are no longer produced in the anthracite field to any extent, to $2.25 to $2.75 for the nut and stove sizes, which compare somewhat in general size to anthracite, chestnut, stone and egg sizes. Prices for low volatile screenings from about $1.25 to about $1.35 a ton at the present time. Generally speaking, these smokeless coals are of the highest grades of bituminous coal. There are some exceptions for certain specific purposes.

There are certain markets in the country in which smokeless coals of southern West Virginia, for example, have [fol. 539] no freight rates or have to take the combination of local rates which would make their delivery price considerably above the equivalent of anthracite value. There are also certain sections that have used anthracite for generations and prefer it because of its greater cleanliness and less degradation. In a great many communities the chimneys in the houses have been designed to burn anthracite coal (1146) and do not have enough air to use either low volatile or high volatile coals without making objectionable smoke. There are smoke ordinances in a great many large consuming centers.

The heat value of anthracite coal is less per pound than for smokeless coal, and slightly less than the general average of high volatile coal.

I do not think there would be a substantial shift to the use of anthracite if bituminous prices were raised 20¢ to 30¢ a ton, because competition with anthracite is on a delivered price basis in the various markets of the country and that advance would be greatly lessened in a comparison of the delivered values of the coal by reason of other charges that enter into the making of the delivered prices. There are a great many areas in which (1147) the competition of anthracite coal and of bituminous coal is not as acute as in other areas.

Generally speaking, the fact that the price of industrial coal is lower than that for domestic coal is not because of any difference in the quality or heat value of the larger [fol. 540] sizes as compared with the slack. The chief reason for the difference is that domestic coal is purchased by some 5,000,000 to 6,000,000 consumers while industrial coals are purchased by a tremendously smaller number of large purchasers and the difference reflects the purchasing power of those large consumers. Also the seasonal nature of domestic coal sales brought about by the habits of the buyers, that is, the desire of the domestic consumer to secure his coal just as late as possible in the season, tends to make domestic prices higher than if those consumers would take their coal evenly over the year. The smaller or slack sizes are better for steam uses than the larger sizes.

The difference between domestic sizes and industrial (1148) sizes before the NRA code was adopted, for the

month of August, 1933, was $1.16 a ton. Under the code in August, 1934, the difference was 94¢ a ton.

It is no more difficult to sell domestic coal at the average market price then prevailing than it is to sell fine or industrial coal at the market price then prevailing. From a strictly cost selling standpoint, it costs more to sell prepared coal because it is sold in considerably smaller lots. That is generally true of the industry. There are exceptions to the rule on the part of those producers who may have either a premium prepared coal or a premium slack coal, but those exceptions prove the general rule.

The following statement and answer were made by Mr. Critchlow and Mr. Whitney:

(1154) Mr. Critchlow: Our contention is that the coal is mined to fill orders, that the mine is not run unless there are orders. Now, in the preparation of the coal which is mined to fill orders already on hand, there necessarily comes into the production certain sizes which are not necessary to fill those orders, and it is those sizes only that may be said to be unsold coal. Do you differ from that statement, Mr. Whitney?

Mr. Whitney: No, not if you say it is the general rule. It is not the universal rule but is the general rule.

(1151) Low volatile coal is produced in Pennsylvania, Oklahoma and Arkansas, in addition to the smokeless fields. [fol. 541] This coal generally speaking is similar and is of higher quality than high volatile coal but not for all purposes. There are certain grades of high volatile coal that are superior to smokeless coal for certain purposes, as for instance, by-product application. There are coals, such as the eagle seam coal, which tend to reduce the coking time of ovens and have for years commanded a higher price than smokeless coals for that purpose. There are certain premium splint high volatile coals which are preferred in certain rural sections of the country because there is not the degradation there is in smokeless coal, and smoke is not an important item.

By the Court:

By degradation is meant the breakage of the larger pieces of coal down to smaller pieces.

(1152) By Mr. Critchlow:

Low volatile coal is superior to high volatile coal for those applications where the emission of smoke is important. In a number of western and eastern cities there are ordinances affecting the applications of coal in certain restricted areas. Low volatile coals are generally higher grade steam coals than high volatile coals.

[fol. 542] W. A. RICHARDS, heretofore called as a witness on behalf of the defendants, was called as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Whitney:

Referring to the companies with which I personally have been associated, it certainly was not customary or usual, in the absence of a checkweighman, to defraud the miners of from 10% to 50% of their just earnings. I was a member of the executive committee, and president of the Winding Gulf Operators Association. (1163) I have been a member of the executive committee of the Pocahontas Operators Association and a member of the executive committee and president of the Operators Association of the Williamson field, and it was not usual or customary to defraud the men in those districts.

It was not usual or customary for my company, when a man had resigned or been discharged from employment, thereupon immediately to evict him from his house. I think it is generally true of the district that when a man is discharged or resigns he is not immediately evicted.

Cross-examination.

By Mr. Critchlow:

I have been in that field since November, 1924. I came south years after the Mingo County trouble. (1164) It is true that the operators in that field were opposed to [fol. 543] unionization. The practice has been about the same, both non-union and under the union, in respect of keeping on the payroll employees of objectionable character.

By the Court:

An objectionable employee for a number of different reasons was given proper notice and asked to vacate his house but in no case that I have any knowledge of was any immediate ejection of that man made. He would move out, possibly in two weeks' to a month's time.

By Mr. Critchlow:

There was an injunction in force down there restraining union activities when I went south up until the Norris anti-injunction act. (1165) Union and non-union activities were hotter before I went down there than after I had been there. The injunction covered the whole area to the best of my knowledge and belief.

[fol. 544] (979) PHILIP MURRAY, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lewin:

My name is Philip Murray. I am the international vice-president of the United Mine Workers of America. I have been associated with the coal mining industry for a period of 38 years, 22 years of the time being as vice-president of the United Mine Workers of America. It has been my duty to keep informed as to conditions in the coal mining industry throughout the United States and in particular the conditions in connection with the labor employed in the coal mines. The mine workers of the nation are associated into a national organization because of the competitive relationships that exist between wages and costs in the various producing districts of the country. (980) We attempt to have a widespread national organization to maintain, through the processes of collective bargaining, a degree of uniformity with respect to wage relationships. It is not only necessary to the welfare of the mine workers that that sort of wage relationship be maintained in the bituminous mining industry, but it is very necessary to the welfare of the industry generally.

(981) The effect of a variation in wage standards throughout the mining industry creates chaos in marketing [fol. 545] and competition among producers. (982) It is necessary to have collective bargaining on an industry-wide basis in order to have it effective. Our experience in dealing with the problem of wage making since 1890 makes it quite obvious that it is necessary for a form of collective bargaining to be maintained in the industry. The history of the industry, as far as I have gone into it, dating back to 1871, indicates that every attempt that has been made to estabish wages has been one that has given consideration to the interstate relationship of (983) wages in each state to each other and the labor cost of production and its relationship to the total cost of production in all the producing districts throughout the country.

(988) Our experience in the field of collective bargaining demonstrates that we cannot successfully maintain collective bargaining over a long period of time so long as the collective bargaining is predicated upon a local district or small group of districts. The bargain then has no relation to other districts that have not participated in the wage-making. The history of collective bargaining in the bituminous coal industry before the war is based upon an interstate arrangement or agreement perfected from year to year between the producers of the states of Illinois, Indiana, Ohio and western Pennsylvania, and the representatives of the United Mine Workers of America from the four district organizations in the same territories. The [fol. 546] basis (989) upon which these agreements were arrived at was usually predicated upon the fact that whatever agreement as to wages and hours was finally arrived at for the four states comprising the central competitive field, that would finally be applied to all unionized districts not parties to the central competitive field conference. Those other districts were central Pennsylvania, Maryland, the organized portions of West Virginia and Kentucky, the states of Iowa, Missouri, Arkansas, Oklahoma, and Texas, Montana, Colorado, Wyoming and the state of Washington. (990) Agreements were made in those outlying districts by collective bargaining, and then coordinated to the basic agreement arrived at in the central competitive field.

Each scale-making area, or at least the International Convention of the United Mine Workers of America, was

usually convened in the City of Indianapolis prior to the meeting of the central competitive field wage scale conference. At this convention of the United Mine Workers of America a national wage policy was enunciated, and the officers of the United Mine Workers of America instructed by the convention of delegates to put into effect in all outlying districts, not parties to the central competitive wage scale conference, the terms and provisions and conditions usually attained or accomplished in the central competitive field conference. While our central competitive wage scale conferences were under way, the custom had been to assemble our wage-scale committees, miners and operators [fol. 547] from all outlying districts to sit in the city where the central competitive wage scale conference was being had, to offer advice, give counsel, and make such suggestions as might be helpful to that conference in arriving at its conclusion; so that no one in the unionized portions of the industry at least might have the impression that there was any desire upon the part of the central competitive field to (991) impose an unjust situation upon any mining district in any part of the country. The workers in the outlying unionized fields were always consulted first.

I am familiar with conditions with respect to the strike in 1919 and its injunction by some of the courts as a violation of the Lever Act. The strike itself lasted for a period of about six weeks from the beginning of October until about the middle of November. It occasioned a rather serious shortage of coal, the result or effect of which was—unusual rise in prices, occasioned naturally by national stoppage. (992) After the issuance of the court order restraining the strike, the mine workers ordered all men to return to work and a commission was appointed by the President of the United States which rendered a decision officially granting a 14% wage increase, in 1920.

The strike of 1922 was occasioned by the refusal of a large number of substantial producers of coal in the central competitive field to participate in our wage conference. Our contracts automatically expired March 31, 1922, and having made no wage agreement to supplant the one which had expired (933) a suspension of mining took place April [fol. 548] 1, 1922, which lasted until about the middle of August, 1922. That strike affected 70% of our national production of coal for a period of approximately four and

a half months. 30% of the production, emanating from what were then called non-union mines, continued to be sold and mined during a portion of that strike. The result of the 1922 strike could be likened to the result of the 1919 strike, the only difference being that the 1922 strike caused a very serious national shortage of coal, the non-union mines being unable to supply or to meet the needs of the nation. The effect was an unusual boost in the price of coal all over the country, minimum prices on contract coal being about $3.75 and ranging from there to a peak of about $20 a ton for spot coal.

(995) The strike continued from April 1 until August 16 or 19, 1922. Then there was an immediate resumption of operations, a settlement being made in Cleveland during August. There was a tremendous stepping up of production, and before any change took place in the price structure of coal some 400,000,000 tons of bituminous coal had been mined and marketed at those unusually high and very exorbitant prices. (997) Some of the prices went to a peak of $20 a ton for some spot coal. (998) The average price of coal went to extraordinary heights.

With the exception of the Kanawha field, the Paint Creek and Cabin Creek sections and the Big and Little Coal Creek sections, which were high volatile fields, we had no organi-[fol. 549] zation in southern West Virginia during the course of the 1922 strike. (999) There were no labor organizations in the unorganized territories of southern West Virginia during that period. Generally employees in the mines south of the Ohio River, with the exceptions I have named, were not permitted the right of collective bargaining with their employers through their representatives. (1000) The typical contract that prevailed in the unorganized fields of southern West Virginia during that period was the individual or the yellow dog contract that prohibited the individual from joining a labor organization of any kind or description while in the employ of the company. (1001) The causes that led up to the absence of collective bargaining in the south and the prevalence of the yellow dog contract were the colonization of mine labor in isolated mining communities, the compulsion on the part of a mining company that employees must live in company houses before they get employment, the restrictions that were placed upon employees by coal corporations in re-

fusing employees under any and all circumstances to freely assemble for the purpose of discussing questions affecting the organization of themselves into labor (1002) unions, or for any other purpose that might have had to do with either their civic or their social betterment. (1003) When I refer to the isolation of miners in the mining colonies, I mean that mining communities are usually built in places that are not close to either industrial centers of population or [fol. 550] any other kind of centers of population. They are separate and apart. They are away from everything that has to do with other than coal mining. The only industry around such a community is the coal mining industry, the coal mine itself, the coal plant, the company houses, the company store, the company office, and that usually is a coal mining colony. In that respect I think the southern mines at that time were different from the northern mines, speaking generally. Most every one of the coal mines was built close to centers of population in the north.

(1004) What I mean by the term collective bargaining is something similar to the sort of collective bargaining institution that we have in the mining industry. We have great associations of coal operators in every coal producing district of the country. These coal operators' associations elect from within their associations wage scale committees of the districts. They designate those men to represent them in these collective bargaining negotiations. The United Mine Workers of America, on the other hand, have 28 separate district organizations. They meet in their district conventions. They select their district wage scale committees. (1005) These mine workers scale committees are authorized by the mine workers, in convention assembled, to represent the mine workers' interests in a joint wage scale meeting for the purpose of working out a collective agreement affecting wages and conditions of employment. That is what collective bargaining means to miners and operators in the coal industry. That is the history and practice of mine workers and coal operators wherever collective bargaining is resorted to. In order to have collective bargaining it is not necessary for there to be any [fol. 551] particular labor union. There are other unions that collectively bargain on questions of wages, hours and conditions of employment besides the United Mine Workers of America. I was just giving the collective bargaining

of the United Mine Workers of America as an illustration of collective bargaining generally. It is fair to say that collective bargaining is a bargaining between representatives, for instance, of a group of labor on the one hand, and a group of operators on the other.

(1006) The absence of collective bargaining has always caused strikes. It has caused strikes in coal fields where (1007) there was no collective bargaining, and it has precipitated strikes in districts where collective bargaining existed. A constant effort has been made by the United Mine Workers of America throughout the years to extend the principle of collective bargaining into all the unorganized fields of this nation—unorganized coal fields. Those efforts were resisted by the employers. I cannot recall any material degree of success that attended our efforts in organizing the unorganized mine workers of the south prior to the enactment of the National Industrial Recovery Act. The United Mine Workers of America specifically made such efforts. (1009) The reason the United Mine Workers of America were anxious to extend the principle of collective bargaining to those territories was in order to improve their conditions of life, to furnish them a better outlook, to improve their standards, (1010) to furnish them [fol. 552] an opportunity to secure through the process of collective bargaining a better wage, better conditions of employment, to free them from the influence of company-owned towns, to free them from the straight-jacket influences of the yellow dog contract. It also had an interest in the influence that it would have upon collective bargaining where already established. The unorganized sections of the south where no collective bargaining prevailed, constantly placed in jeopardy the collective bargaining settlements in the coal mining districts of the north by threatening the maintenance of the wage structure that had been set up in the north. (1011) The lower wages and longer hours in the south and the absence of collective bargaining there influenced conditions in the north because of the competitive relationships that existed between those producing districts in view of their coals entering substantially the same markets. The fact that the southern coals were mined at a lower cost took the markets of the north away, creating unemployment in the north, caused abrogation of wage agreements on the part of large coal companies, precipitated

strikes of state-wide areas, and in many states caused evictions, bloodshed, riots and disturbances. The absence of collective bargaining in the unorganized districts south of the Ohio River materially affected the price situation in the states north of the Ohio River.

(1012) In 1922, when the great strike in the unionized [fol. 553] fields took place affecting about 70% of the National coal production, that was caused by the unionized operators' refusal to make any wage agreements. The excuse which they offered was that they could not hope to maintain the wage structure and could not hope to maintain their markets so long as southern coals were being mined at costs and sold at prices substantially lower. They therefore insisted as early as 1922 as a condition upon which a conference might be convened that they must accept an arrangement that would provide for a continuous competitive wage scale with states south of the Ohio River. The organized mine workers would not subscribe to that proposition and a strike ensued. In anticipation of the strike there, approximately 75,000,000 or 80,000,000 tons of coal were stored above ground. (1013) In the early part of 1924 the so-called Jacksonville agreement was arrived at between northern producers and the United Mine Workers of America. That agreement terminated in March 31, 1927. Following the 1922 strike there was a decided shift in production from states north of the Ohio River to states south of the Ohio River. That condition continued until about 1929 or 1930. The shift of production had its effect upon the whole competitive structure in the Appalachian area. It proved disastrous to many mining corporations in states north of the Ohio River and was fairly successful for a period of two years to producers south of the Ohio River. Causes which might be attributed to the conflict which took place in 1927 I believe commenced in June of 1925.

[fol. 554] (1014) About the time of the expiration of the Jacksonville agreement, March of 1927, another attempt was made by the mine workers and operators to negotiate a contract. We had a meeting in February, 1927, in Miami, Florida. The Jacksonville agreement was signed by practically all of the substantial producers north of the Ohio River. The north West Virginia district was a party. The Kanawha field of West Virginia originally participated in the conference and became a party to the agreement, but

in June, 1925, broke away contending that its competition from the Logan and Williamson fields of West Virginia was so severe that it could not hope to maintain its agreement, and would be compelled either to abrogate the contract itself or secure through other means an agreement with the mine workers that would bring their wages down to a wage similar to that in the Williamson and Logan fields. The Kanawha field eventually broke away. It was later followed in the summer of 1925 by the Consolidation Coal Company abrogating its contract in the northern field of West Virginia. The Buffalo, Rochester and Pittsburgh Coal and Iron Company, in central Pennsylvania then abrogated its agreement in the latter part of 1925. At about the same time, the Pittsburgh Coal Company, which was the largest single producer of commercial coal in the United States at that time, abrogated its contract. The organization of mine workers was engaged in the conduct of a guerilla war with many very substantial producers who had abrogated their contracts during 1925. In each instance, wherever the abrogation took place the poster at the mines advising employees that wages were about to be reduced was usually accompanied by the statement that the producer was compelled to reduce wages because of inability to compete with people [fol. 555] producing and selling coal in the same markets. The condition of major producers breaking away from the organization continued. It entailed a great deal of sacrifice on the part of the employees and their wives and children in the states of West Virginia, Ohio and Pennsylvania. The mine workers resisted the effort of the employers to abrogate their agreements. A large force of private policemen were employed by the large companies. (1016) A notable instance is to be found in the Congressional Record of 1925 with reference to the investigation by a Senate Committee. The record shows that there were 5,200 private policemen employed by corporations in the state of Pennsylvania in an attempt to destroy the organization of the United Mine Workers during that period; that injunctions were issued, State and Federal, to restrain the members of the United Mine Workers of America from engaging in strikes or picketing at mines in the central Pennsylvania district. The most notable injunction issued during that strike was the one issued by the judge in Indiana County in central Pennsylvania which prohibited striking mine workers from

holding meetings of any description, although their meetings were being held for the purpose of trying to maintain their contract standards. That condition of guerilla warfare continued until the legal expiration of the contract on March 31, 1927.

(1017) During that period there were very serious interruptions in the operation of the mines, including mines [fol. 556] engaged in the sale of coal in interstate commerce. I cannot state the exact amount, but the production ran I suppose into several million tons. The territory covered the states of Ohio, Pennsylvania, northern West Virginia and a portion of southern West Virginia. The strikes and interruptions in northern West Virginia were accompanied by riots and disturbances. By guerilla warfare I mean that the special policemen and our mine workers were engaged in actual physical combat. We had no martial law in the State of Pennsylvania but I believe we had sheriff proclamations prohibiting the assembling of two or more persons in given communities during the period of these disturbances.

(1018) In February, 1927, the operators and mine workers of the central competitive field met in Miami. Mr. Haskins of Ohio, the spokesman for the operators in that conference, presented a resolution, a copy of which I have here. (1019) This was the wage proposal that was submitted to this conference by the operators.

(1020) [The proposal submitted by Mr. Haskins at Miami in February of 1927 was then offered and received in evidence as Plaintiff's Exhibit No. 62.]

This wage proposal of the operators was not accepted by the workers. There was no wage agreement consummated at that time. The strike of 1927 followed.

(1025) When the Miami conference convened February 14, 1927, Mr. Haskins, in behalf of the coal operators par- [fol. 557] ticipating in the meeting, presented the resolution marked Plaintiff's Exhibit No. 62. It was the only proposal offered the mine workers and suggested that the wage scale to be negotiated commencing April 1, 1927, must be continuously competitive with the wages and conditions prevailing in West Virginia and Kentucky (then substantially unorganized); that a commission of four men be created to be composed of two miners and two opera-

tors, buttressed by three mediators to be selected by the Chief Justice of the United States Supreme Court in event the parties should be unable to agree upon the selection of the mediators; that it should be the duty of this commission to determine a competitive wage scale for the central competitive field; (1026) the operators insisted that the mediators and the commission visit the mines and operations in the unorganized territories and ascertain the actual wages being paid non-union miners and the actual conditions of their employment; that when the commission should arrive at a determination as to the actual wage in the non-union territories it should write into the central competitive field wage scale a wage that would be truly competitive with such non-union wage; that the commission should continue to function thereafter and proceed to readjust from time to time the wage scale in the central competitive field in order to maintain competitive conditions between that field and the non-union territories; that the commission should have final jurisdiction in all grievances appealed to it from the various districts. (1027) The mine [fol. 558] workers refused to accept this proposal, because it would have destroyed completely the principle of collective bargaining and would create a wage making situation for the unionized areas that would tie wages and hours and conditions of employment of union miners, to the wages, hours and conditions of non-union workers. This proposal resulted in the breaking up of the meeting and precipitated the strike which spread through the territory of Pennsylvania, Ohio, Indiana, Illinois and certain unionized sections of West Virginia, particularly northern West Virginia. This was the so-called strike of 1927. There were in the neighborhood of 250,000 men involved. The strike continued in western Pennsylvania and Ohio districts, at most of the properties, until some time during 1928. A settlement was effected in Illinois and Indiana, continuing the old wage arrangement until March 31, 1928.

(1028) The effect of the strike in the northern mines was an interruption of production at a very substantial portion of those mines. The actual amount of tonnage lost to northern producers I do not know, but it was considerable. There was a drifting of the lost tonnage from the mines closed down in the north to the non-union operations south of the Ohio River. The economic forces of the strike were

sufficient to destroy the organization of the United Mine Workers of America in the states of Ohio and Pennsylvania and in the northern West Virginia district, and all of those territories went completely non-union. With the destruction of the union there came about the full and [fol. 559] free play of cutthroat competition in all those territories resulting in continuous wage cuts, degradation of living standards, degrading of prices and pauperization of mine workers.

(1029) There was no collective bargaining in the states of Ohio, western Pennsylvania, West Virginia or Kentucky from the beginning of the 1927 strike until the fall of 1933. The basic wage at a number of the so-called high cost and uneconomic properties in the north dropped to a figure of about $1.50 a day. There was no regulation as to hours. The large and more substantial producers paid a wage of $3 a day until about the spring of 1933. Reports were submitted to my office by field agents which showed that the wage level in some instances in the Logan and Williamson fields in the southern territories dropped to as low as $1 a day. (1030) The hours of employment went from 8 to 10 and 12 and 14 hours a day. The record of the mining industry during that period showed that the average operating time in all the mining districts throughout the country was from three to three and a half days per week.

There were deductions from weekly income resulting from the day wage multiplied by the number of days an employee could work. There were normal deductions incident to coal mining. The miner who loads coal has to purchase powder for shooting his coal and that averages about 3¢ per ton. The average production per miner in the entire Appalachian area is 9.1 tons per day, according to an [fol. 560] estimate submitted at our conference by the National Recovery Administration. In addition to his deduction for powder the miner has a regular charge of 5¢ a day placed upon him for the use of electric caps which he has to use. Then he has a charge for blacksmithing which ranges anywhere from ¼¢ on each dollar to as high as 1¢ in certain territories. Then the miner has his regular charges for doctor (1031) ranging anywhere from $1 for a single man to $1.50 and in some cases $2 for married men, per month. Then the miner has his normal charges to maintain him at his job, for the purchase of his mining equipment, his tools, such as picks, shovels, augers, sledges,

wedges, axes, and all the other implements necessary. It has been conservatively estimated by people who have made a study of these charges that the average deduction taken from the piece work miner in a coal mine is 70¢ per day. That does not include rent. (1032) At each of the important interstate wage conferences consideration was given not to the gross earnings of miners but to the net earnings. (1033) Unfortunately, most of the Government's figures having to do with the earnings of bituminous coal workers have not covered the factor of deductions. In the testimony, when I have referred to the daily wage of $7.50 a day or $1.50 a day or $3 a day, I am referring to gross wage.

(1036) The attitude of the operators with respect to those constant wage cuts following the 1927 strike was one of complete helplessness. The entire industry in the Appa- [fol. 561] lachian fields had gone non-union and the forces of cut-throat competition were in operation. One producer did not know what his neighbor was paying his labor. The coal operators caught in that situation, as a result of their failure to recognize the stabilizing influence of collective bargaining were forced into the competitive rut when the tremendous forces of big buyers were brought into play such as the railroads, the utilities and the larger consumers of coal. They could go to a coal producer, for instance in Pittsburgh, and ask that coal be quoted and when quoted if it was not satisfactory they would tell the Pittsburgh operator that they would get it in the Logan or Williamson field (in West Virginia) if they could not get it there. (1037) The same forces played havoc with the smokeless fields of the south and the low volatile districts of the north. Every large consumer of coal purchasing substantial quantities of coal for use in New York or Philadelphia or whatever section it might be, would depress the price in central Pennsylvania. If the central Pennsylvania producer was unable to meet their price they would then get their coal from southern West Virginia. The coal producers were driven into a state of desperation through their unwillingness to recognize the only stabilizing influence that could substantially control the forces of competition, that being the principle of collective bargaining. Each time the price of coal was cut 10 or 15 or 20¢ a ton notice was posted at the colliery advising the mine workers, even in the middle of a pay period, that effective a

certain date wages would be reduced. The force of the economic situation caused miners to live in a condition bordering on starvation. (1038) It was a buyers' market not only then but has been for a great many years. These [fol. 562] conditions continued until 1933 and were general throughout most of the coal producing areas of the United States.

(1039) In 1933, after the passage of the NIRA the mine workers had recognition of their right to assemble and to organize under Section 7(a) and six weeks after its passage over 90% of all the coal miners in the country had joined the United Mine Workers of America. An appeal was then made by the officers of the union to the President that a conference be organized under the auspices of the Government to effectuate a wage agreement. It was suggested that a conference be convened in Washington. The meeting was held in July, 1933, and continued throughout August and the major part of September. The meeting of Appalachian coal operators and representatives of the United Mine Workers, respectively, representing 72% of national tonnage and 72% of employees, negotiated a wage agreement (1041) which became effective October 1 or 2, 1933. It established a more closely competitive wage relationship than had ever prevailed in the industry. It established a base rate for skilled inside day men—tracklayers—of $4.20 in states south of the Ohio River and $4.60 in the northern states in the Appalachian region. It conceded an increase of 10¢ per ton on the combined loading and cutting rates and an increase of 10% on all yardage and deficiency work. Schedules as to tonnage rates and basic day wages for all districts in the United States were written into a [fol. 563] bituminous coal code. That agreement continued until March 31, 1934. Prior to its expiration a new agreement was made which placed skilled trackmen in states south of the Ohio River on a basis of $4.60 per day and skilled trackmen in states north of the Ohio River on a $5 base. It also established a uniform seven-hour day and five-day week for mine workers in the Appalachian coal fields, with exemptions granted to certain classifications of labor. This schedule was written into the code and the seven-hour day became applicable throughout the nation. (1042) The agreement continued until March 31, 1935. Prior to its expiration, the conference of the Ap-

palachian operators and representatives of the United Mine Workers of America convened at Washington to make another wage contract. The mine workers representatives submitted definite proposals and the operators' spokesmen stated that they were unable to make the concessions asked for, explaining that this was due to the effect of a gradual breaking down of the price structure in the industry, which, according to their stories, commenced in 1934. The conferences continued until March 31. The President asked the mine workers and operators to continue at work until June 15 and continue to try to execute an agreement. The extension was granted until June 15. There were four additional extensions of the contract and finally in the latter part of September of the present year an agreement for the Appalachian coal fields was consummated. (1043) [There was substituted for Defendants' [fol. 564] Exhibit No. 21 a new copy of the Appalachian agreement, with a copy of the Pocahontas-Tug River agreement annexed.]

(1044) In the summer of 1933 in the midst of the campaign of organization among the mine workers in the Appalachian coal fields strikes took place in central Pennsylvania, western Pennsylvania, Ohio, northern West Virginia, southern West Virginia, Kentucky, Tennessee and Virginia, being caused by the employers' refusal to meet the mine workers for collective bargaining purposes after they had joined the union. The 1927 strike, previously testified to, continued through 1928. (1045) There were no strikes in 1929.

I attended the meeting between the operators and representatives of labor in Washington before the industry accepted the NRA code, and I took part in the negotiations. The operators who participated hailed with delight the opportunity to extricate themselves from the position they had been in prior to the passage of NIRA.

(1046) The labor cost constitutes the largest single and most important factor in the cost of production of bituminous coal. Where no collective bargaining exists, the labor factor in production costs is the factor that is most susceptible to attack and is always attacked by the producers when they are attempting to reduce costs. The balance of the costs consist largely of taxes, which are

rigid and inflexible, power charges, and other and sundry [fol. 565] maintenance charges that are all more or less fixed, and not subject to attack.

Hours in the coal industry today are fixed upon a national basis. (1047) Every organized district is operating on a basis of 7 hours per day, 35 hours per week. That constitutes today almost 92% of the operations in the country, and approximately 92% of all the men employed. (1050) You cannot maintain effective collective bargaining in the bituminous coal mining industry on the basis of negotiating contracts by small units. Coal operators are not responsive to wage making of that kind. I doubt that there is a coal operator in the United States that would be willing to sit down and negotiate a wage agreement without knowing in advance what wages his competitor is going to pay in an adjoining state or district. The district agreements as such, or small group districts, that are not truly representative agreements of that description cannot be maintained and have proven to be very ineffective. The force of the competition from territories having no agreement results invariably in the breaking down of the agreement where it is arrived at in that form. The wage differential problem in the industry is perhaps the most important and far reaching of any factor that has to do with the maintenance of competition. In the course of our wage meetings in the Appalachian region, operators from each of the producing districts first present their actual wage on a piece work basis and day wage basis, their total cost, and their labor cost, and then attempt to compare their wage and cost set-up with that of their competitor. (1051) [fol. 566] The differential problems in these great mining areas have always received major consideration in the determination of the wage agreement finally arrived at.

(1052) As an example: When we negotiated our last Appalachian wage agreement, one small district, known as the southern Appalachian district, withdrew from the conference before the contract was signed asking that it be privileged to increase its differential for day wage workers from a point 40¢ per day below the northern districts to a point 80¢ below, and to a point 40¢ below their southern competitors. The conference decided that it would not extend that privilege. When the southern Appalachian producers presented their petition the Virginia producers

presented a complaint contending that if any consideration was given the southern Appalachian district that might widen the differential as between that district and Virginia, the Virginia district would not sign the agreement (1053) and preferred to close its properties down and engage in a warfare with the mine workers, but that, at any rate, it expected to get out of the Appalachian conference the same consideration on day-wage rates as the southern Appalachian producers expected to get.

Then a petition was presented to the conference by the Big Sandy operators of Kentucky, contending that if any concessions were granted southern Appalachian, they expected similar consideration. The Hazard field presented a similar complaint, contending that they expected to get the same consideration as southern Appalachian.

The point involved in this southern Appalachian question was one that involved a cost of approximately four cents a ton for some 6,800 coal miners employed in the territory covered by the Southern Appalachian Coal Producers Association, and the repercussions of that situation were felt in the State of Virginia, back over into the Hazard field of Kentucky, over into the Big Sandy district of Kentucky, and south in the high-volatile sections of southern West Virginia, namely, the Kanawha, Logan, and Williamson fields.

So that one must understand, in giving consideration to the solution of a differential problem and of a wage conference of this description, that even a concession to a group employing 6,800 men in the southern Appalachian coal fields would have had immediate repercussions and effects in every coal-producing district in the Appalachian coal fields. It would have affected immediately 325,000 men in all those producing territories, and it would have affected every single pound of coal produced in this territory, that produced 72 percent of our national tonnage.

[fol. 567] (1054) So that in the final determination of what proper wage relationship should be, consideration is given to every element of cost, charts, maps, production figures, earnings, costs and every factor having to do with the operation of a coal mine. Then the yardstick of common sense is applied so that no interest will be injured, (1055) no dislocation of tonnages will take place and no disturbances of production will take place. The wage rate,

the day wage, the hourly wage, the yardage wage, the deadwork rate, and the payment for every known kind of deficiency, is set out. Each operator who is a party to the Appalachian contract is privileged to have a copy of each of the agreements negotiated in each of the several districts so that he can compute in his own mind what the ultimate cost of his competitor may be. The whole scheme of wages with respect to the question of differentials is considered in its every phase and with most minute detail and the mine workers who are parties to these contracts have to exercise the greatest amount of care in making intelligent and honest decisions because of the very distressing and rather selfish competitive influences that dominate the producers, exercising care at all times to see that every producer who is a party to the wage arrangement is given an [fol. 568] honest deal.

A checkweighman is a miner employed by the mine workers and paid by them to check the weights on the mine tipple. (1056) So far as it affects a coal miner, the employment of a checkweighman is one of the most important things in his life. The history of the industry is replete with abuses which have resulted from practices where corporations have refused mine workers the privilege of employing a checkweighman. The men are deprived of their honest weight. We have had many instances in all these fields, not only the south but the north, where the miners have no organization and where they have had no checkweighman. The record is replete with facts showing that mine workers were deprived of their wages in amounts ranging from 10% of the amount they actually loaded to 50%. When we were negotiating our 1933 wage agreement the code had a provision in it requiring the companies to recognize the employment of checkweighmen. We had such a provision written into our 1933 contract. (1057) The checkweighman sees that the weight of the coal produced by each miner is accurately determined. Under the Appalachian agreement, the miners have the right to choose their own checkweighman and they pay him themselves. The presence of the checkweighman imposes no burden upon the operator. When we signed the 1933 agreement we had to extend the time 60 days to almost every non-union producer in the Appalachian territory, (1058) to furnish them [fol. 569] an opportunity to put scales in the tipples so that

the men could have a checkweighman employed. The matter of having checkweighmen has been investigated in a number of Federal and State investigations.

(1059) There has been in the coal mining industry a requirement that mine workers live in company houses and trade in company stores. That was a condition of employment in the non-union mines prior to 1933. The effect of the requirement was to prohibit or prevent men from enjoying privileges that ordinarily accrue to citizens who enjoy freedom to rent where they please. (1060) The forced use of company houses was part of the life of the non-union sections of the United States, a condition that developed with the prohibition of free assemblage and the individual or yellow dog contract. It is all part of the general non-union scheme of things and had its distressing and dire effect not only upon the people who occupied the homes directly but also a terrific competitive effect because of those advantages over producers who recognized certain rights in union territories in various sections of the United States. I have read hundreds of rental agreements all over the country. (1061) I have not read Carter Coal Company's agreements. The rental agreements generally contain provisions that require the employee to vacate the house on notice if he violates any of the regulations or stipulations set up in the individual or yellow dog contract. If he attended a meeting of the union he was subject to eviction. (1069) These rental agreements have a decided effect upon the wage standards of the miners, not alone in [fol. 570] the actual amount of money that the employee is required to pay for the renting. The lease so overshadows every activity of the miner's life while he is in the employ of that company that it is the controlling factor in his need for dealing at the company store, (1070) because his refusal to deal at the company store might mean his eviction from the company house. Again, his refusal to accept a change in his working conditions that might reduce his earnings makes him assume the immediate hazard of being evicted from his home.

After discharge there follows immediate eviction, so that the forced living in company houses is one of the most dominant factors in a miner's life. By immediate eviction I mean that the employee can be given notice at any time by his employer. He usually resorts to the local justice of

the peace to get a stay of the execution of that eviction but, pending the hearing of his case, his furniture oftentimes is in the street. The lease provides for eviction upon notice. We have had thousands of instances when our organization has been required to take these miners and move both them and their families into some sort of place until the miner was able to get employment elsewhere. (1077) That is one of the many conditions that has contributed toward countless numbers of strikes.

The history of collective bargaining is based upon the theory that it will build up better industrial relationships [fol. 571] between employer and employee. I know of no labor agreements in the United States with respect to any other industry that go deeper into the problem of setting up improved relationships between employer and employee than do the collective bargains arrived at between our organization and the operators. It reduces strikes. (1079) Each of our district agreements provide for the selection of a mine committee the duties of which are confined to the peaceful adjudication of disputes arising under the agreement. In event disagreements ensue between (1080) the mine committees and the mine management, or between the management and the representatives of the United Mine Workers of America who happen to be officers of the district organization, then a method is usually provided for reference of the disputed question to an umpire or board of arbitration. Every possible precaution is taken to prevent the possibility of a strike occurring during the life of the agreement. We find that this system of collective bargaining has built up in the industry a better and closer relationship and a better understanding between employer and employee than usually prevails where collective bargaining does not exist. It prohibits strikes and penalizes the men who indulge in strikes in violation of contract.

(1081) Collective bargaining binds all parties represented and all the wage earners who appoint representatives to negotiate. Our contracts are all made and based [fol. 572] upon the rule of the majority ruling. That applies to all our policies.

There was martial law in the State of Alabama in 1908, with the use of state militia. There was martial law in Westmoreland County, Pennsylvania, and the use of state militia in 1910. There was martial law in the State of Colo-

rado in 1913 (1082) involving the use of state militia. In 1919, during the October and November strike, Federal troops were used in the State of Wyoming. In 1920 and 1921 Federal troops were used in West Virginia. In 1922 Federal troops and National Guard were used in central and western Pennsylvania, Colorado, Ohio, Indiana and Kansas. In 1927 in central and western Pennsylvania there were used the state militia and there was the issuance of sheriffs' proclamations prohibiting meetings. In 1935, in western Kentucky, state militia were used. I have had personal experience in dealing with the problem of strikes where Federal troops were used, particularly in West Virginia. In 1921 I was requested by President Harding to cooperate with Brigadier General Barnholtz of the Federal Army in quelling an insurrection in West Virginia, so termed by the Governor and by the President. The unionized portion of the southern high volatile section of West Virginia and the non-union portion of that territory in 1921 was separated by a mountain known as Blair Mountain, (1083) the Little and Big Coal River sections of the Kanawha field being located in the organized portions [fol. 573] of the territory, and the Logan and Williamson fields being across the mountain. For a period of about three months prior to development of this insurrection, riot or whatever it might be called, there was considerable sniping between what were known as Baldwin-Felts guards employed by coal companies in the Logan field and union mine workers who were on the union side of the mountain. The shooting resulted in two men being killed by the Baldwin-Felts people at a little town named Sovereign, some 60 miles south of Charleston. When these men were shot, the alarm was spread and mine workers employed in Paint and Cabin Creek, Kanawha, Big and Little Coal River sections, started out en masse, with guns, and marched in the direction of Logan where some 10,000 of them under arms were engaged in virtual war with an army of Baldwin-Felts guards and members of the state militia, for a period of three or four days. The President was asked by Governor Morgan for Federal assistance and he despatched 5,000 Federal troops and located them at the town of Hamilton, Ohio, ready to move into the war zone. There was a great deal of shooting, a number of people injured. (1084) In the midst of this conflict I was called over the telephone

by President Harding at the City of Indianapolis and asked if I would not render whatever assistance I possibly could toward quelling the disturbance by going out into that zone and asking the people to peaceably return home before the Federal troops moved into the war zone. I told President Harding I would do so and I went to Charleston, West Vir- [fol. 574] ginia. I traveled from Charleston to Marmet and from there to Sovereign and met numbers of men patrolling the highways. The railroad running along that section of 60 miles had been taken over by the miners. Trains were commandeered and supplies were being run from commissaries by men who were fighting on the alleged battle front. (1085) I succeeded, with the assistance of Major Hamilton of the United States Army, in persuading the mine workers to return to their homes and so reported to Brigadier General Barnholtz who was stationed in the City of Charleston and in actual command of the activities of the Federal troops not only in Hamilton, but the 200 of them who had moved into Charleston and made their home there. Had it not been for the threat of the presence of Federal troops in that scene, I am quite confident, and the situation was agreed upon by Brigadier General Barnholtz, that there would have been a great amount of property destroyed and a considerable number of lives lost. It was all the outgrowth of a terrific and terrifying economic situation.

Cross-examination.

By Mr. Whitney:

(1091) I cannot tell you the exact number of mines that were concerned in the so-called insurrection in West Virginia in 1921, but practically the whole Kanawha district and the Williamson field and Mingo County were involved. That was about 14,000,000 tons annual production. The [fol. 575] Kanawha district was closed up for about 14 days and the Mingo County field was substantially closed for a period of a year. (1092) I do not think any production in the Logan County field was closed down for substantially a year. In central and western Pennsylvania in 1927 almost all the areas affected by the strike were policed by state troops. That also would be true of the policing by state troops of the strike of 1922 in central and western

Pennsylvania. I could not speak with the same degree of knowledge of the Kansas situation at that time or of the Colorado situation in 1913. All I can refer to in connection with the use of state troops there is the record that they were used. (1093) I have no personal knowledge of the Kansas or Colorado situations, other than the reports of the officers of the United Mine Workers of America at their annual conventions.

The use of company houses was not confined to isolated communities alone. Company houses and company stores were found both north and south, whether they be contiguous to or right in the heart of centers of population or in isolated sections. The common practice in mining is to build mining colonies around the mining properties. (1094) With respect to my testimony yesterday that generally south of the Ohio River miners were denied the right of assembly, as contrasted with the north, I mean that in the isolated mining communities, the township government was usually controlled by the coal company. Where coal [fol. 576] mines are located in the centers of population the local government is in the hands of a free electorate. The contrary is true in isolated mining camps where mining properties are completely controlled as to ground, houses, buildings and mines by the mining companies. The policing of the property usually takes place by the companies. There are a number of isolated coal mining communities that are built up and ruled in the north in the same fashion as they are in the south. Anything that I may have said with reference to that situation was not spoken in terms derogatory of the south as against the north. (1095) Conditions in non-union communities, north and south, have always been pretty much the same.

The rent paid by miners depends largely upon the kind of house. Miners living in company houses usually do not get the same kind of house that they are able to get in centers of population where there are better housing facilities. The rent for the average low-grade company house is not a high rent. The rent for a fairly good company house in a fairly good mining community is reasonably high. (1096) That would depend upon the kind of a house. The normal rent depends upon the size. Company houses range in size from 3 rooms to 6. I know where company rentals run to $22 and $23 a month for a five-room house. That is not

normal. There is a breakdown of that high rate to something approximately $10 to $16 depending on the kind of a house. If a company supplies a miner with electric lights, which is not the common practice, or if it supplies him with running water in the house, or other facilities, then the [fol. 577] mine worker usually has to pay for those things. There is no uniform rental in any district. There is always a variation in rental charges, depending upon conditions in each mining community, and the kind of house the company rents. Offhand, I could not name the exact communities in which the $23 houses are found. I have seen $23 company houses in the Pittsburgh district. (1097) I think the town was contiguous to the Brownsville district. There they had brick houses with bathrooms and modern, up-to-date facilities, and I thought, after examining the houses, that the rents were reasonable, compared to rents charged by outsiders. I do not know what the average rent is in the Smokeless district. The amount of rent a miner is required to pay is never written into a basic agreement. In some of our district agreements there are provisions and stipulations which ofttimes provide that for this period or that there shall be no increase in rents or no decrease. I do not know how many leases I have seen for houses in the Smokeless district. I did see some blank forms of lease during the hearing in the Red Jacket case, in 1926.

(1099) Where there was a denial on the part of the company of the men's right to employ a checkweighman to see that they were given proper weights, it resulted in considerable unrest. I have heard miners make charges in our conventions and at public meetings that they were robbed of their weights in amounts varying from 10% to 50% [fol. 578] of the actual amount of coal loaded. I have heard coal operators make the same statement. (1100) I cannot point out any single instance of my own personal knowledge where I saw a man being robbed of his weight. All I know is that these men who said they were robbed have made these allegations. Where the practice of companies is to deprive the men of their right to have a checkweighman, then the natural answer to the situation is that the reason a company will not give the men the right to employ a checkweighman is because they want to cheat them. This is not merely what I think, Mr. Whitney, but what I have been told by reputable coal miners who load the coal. If

you were privileged to have but one year's experience in the mining industry you would not ask me such a question as to give the name of the miner, the operator and the mine where a miner was cheated. Almost every coal operator in this business will admit that for years the practice of chiseling in mine workers' weights has been the common practice. But if you want a particular example I will give you one, with the name of the miner affected, the amount of weight he was robbed of by a non-union mine, and the name of the coal company. (1102) When I was a boy 16 years of age loading coal at the Keystone shaft in Westmoreland County, Pennsylvania, I was deprived of my own weight in amounts approximating 40% of the coal loaded. The name of the company is the Keystone Coal & Coke Company. The name of the general manager was H. F. Bovard. The name of the family evicted from their home without notice was Murray. The head of that family's name was William. His son was Philip. I am the individual that was involved. Because of the complaint I made I was discharged and the day after a strike took place my father and his eight children including myself were thrown into the street. That [fol. 579] was in 1903. I could give you examples of hundreds of coal miners that would be willing to come here and testify in this Court under oath in the same fashion that I have. I cannot give the names here today, but I can certainly produce them if the Court desires them, and Mr. Whitney wants them.

(1103) When I testified this morning upon the subject I was expressing what other people had told me and individuals who I think would be quite willing to come here and testify to that effect. It has been practiced at non-union properties where the men have been deprived of checkweighmen.

I would say it has been the normal and usual practice to defraud the men at such properties. The men are not protected by the State courts because a coal miner has no money. He is alone. He has no organization to defend him. He has nowhere to go. If he goes to a court, or to a magistrate, to protect those things, he is usually discharged. (1104) The men refrained from going to the state courts because they were afraid of being discharged. If a man brings a case for fraud he will invariably be discharged. I am not finding fault with the law, Mr. Whitney.

It is the condition under which the man is employed that deprives him of the opportunity to get the benefits of the law. He lacks organization. He has no money. He cannot employ counsel; and if he does go, he will be discharged. He will get the same treatment I got, the same treatment I have known lots of other people to get under like circumstances. (1105) Every coal mine in the Smokeless field, so [fol. 580] far as I know, has a checkweighman today. Every single operator in that territory is operating under contract with the United Mine Workers of America. Every coal company, including Mr. Carter's company, recognizes the right of the men to have a checkweighman. Under our present arrangement, the mine workers' organization has no complaint to make of the treatment that employers are giving our people in any of these territories. (1106) That covers about 90% of the tonnage in the United States.

So far as I know, with respect to the strike of 1919 which lasted about six weeks, the following, which is contained in a statement in "Coal in 1919, 1920, and 1921", Government Printing Office, Washington, D. C.:

"By the time the strike had reached its sixth week consumers' stocks in the territory north of the Ohio and Potomac and east of the Mississippi were dangerously low and industries were beginning to close for lack of fuel."

is a correct statement.

With respect to the strike in 1922, in connection with which I testified that the consumers lost about $400,000,000 estimated at $1 a ton on 400,000,000 tons, the strike lasted from April 1 until about the middle of August. The strike itself affected or stopped about 70% of national production. (1108) There was a diversion of the tonnages that were immediately tied up to the non-union districts that were still in operation. To what extent the slack was being taken up through the operation of the non-union mines, I [fol. 581] cannot say. With respect to the $400,000,000 I am talking about the prices the consumer had to pay for the 1922 strike, not solely about the 1922 production, and about the effect so far as prices were concerned being carried over into the 1923 production. I would not say that as a result of the 1922 strike 1923 prices were higher than 1922; I do not know that they were higher in 1923 than

they were in 1922. I know that they were unusually high during both years.

(1109) If I am not mistaken, the total supply of coal stocks above ground before the April strike in 1922 was estimated at around 75,000,000 to 80,000,000 tons. When the 1922 agreement was in existence the best figures obtainable in the industry indicated that the total cost, including labor and all other charges, would approximate $2.70 a ton. The only way you could find those figures would be, I suppose, through the medium of things such as I have gone through in wage conferences, such as the cost sheets of companies. (1110) To arrive at the figure of $400,000,000 which I previously testified to, the statistical division of the [fol. 582] United Mine Workers of America was put to work to ascertain the extra charges that were placed upon the consuming public as the result of the 1922 strike. In the course of our studies of that situation, the field men attached to our statistical department were required to go into every consuming center throughout the country and also take the quoted prevailing spot and contract prices from the trade journals as of those months during the peak period of prices, and the information we collected respecting this $400,000,000 statement which I previously made was derived from that source. I think you will find through a casual looking into the record as of those dates that the average sale of coal under contract from the end of the strike in August until the following April shows that most of the contract coal sold in this country, to railroads especially, was on the basis of $3.75 a ton. (1111) The estimated charge on spot and current coal during that period ranged from $8 to as high as $20 delivered price to the consumer. With respect to the figure of $2.68 average of all coal in 1923 set forth in "Coal in 1927", I do not know where Sydney Hale and Mr. Tryon (who edited "Coal in 1927") got their information at that time. It may be that they secured their information from different sources than we did, but my calculation is based entirely upon a survey that was made by our own statistical organization during the years 1922 and 1923.

My memory as to 1925 is that there had been private po- [fol. 583] lice and injunctions, notably in Indiana County, central Pennsylvania, and interruption to mines aggregating several million tons, and that there had been some phys-

ical combat. In the Allegheny County courts you will find a record of 400 cases involving physical combat. (1112) The Allegheny County court is a court of the State of Pennsylvania.

It would be difficult for me to ascertain the average wage during 1933, when nobody knew what his neighbor was paying. When I stated that the basic wage dropped at the minimum to $1.50 a day and that substantial producers paid $3 a day, I was giving to you the benefit of such information as coal producers have given to us since our 1933 contract was negotiated. I think that coal producers are reliable men just like other men are, and I have obtained this information during the course of our joint conferences. I do not think that anyone could give the average wage paid during 1932 for mine workers. There was a variation of wages ranging anywhere from $1.50 to about $3 at its peak in the beginning of 1933. (1113) It would be just as difficult to establish average working time. When I stated that the hours in 1933 went from 8 to 10, 12 and 14, I was giving to you what I thought was a rather vivid description of the conditions that prevailed throughout the country but I do not know that there was any uniformity as to hours or wages in any district.

When I testified this morning that Government figures on wages do not take account of deductions for powder, [fol. 584] dynamite, other explosives and other deductions of that character, including blacksmithing and tool sharpening, I did not have in mind figures other than those in the booklet entitled "Wages and Hours of Labor in Bituminous Coal Mining, 1933", which says that it purports to state the average earnings for miners computed on net earnings after such deductions. I think the Department of Labor, in connection with those 1933 studies, depended to a substantial extent upon such information as we were able to give them. I do not know prior to 1933 of any authentic figures and I doubt that even the 1933 study (1114) made by the Department of Labor details in any particular sense the common factors used in arriving at the 70¢ conclusion that I gave the Court here this morning. It is true that the report states that the figures given are net, after deducting the items in question. I did not supply the Department all the information that it has there. I was like other people asked to assist the Department in giving in-

formation that might be helpful to it. I would not say that the information is in error.

(1119) [There was offered and introduced in evidence as Plaintiff's Exhibit 63 a portion of page 4 of the document entitled "Wages and Hours of Labor in Bituminous Coal Mining, 1933" issued by the United States Department of Labor.]

I assume that the figures "Before October 2nd, 8.1. After October 2nd, 8. Average for the year, 8.07" given as weighted average working day hours for 1933 in the [fol. 585] publication of the United States Department of the Interior, Bureau of Mines, entitled "Coal detail statistics, appendix to Mineral Year Book of 1934" give a fair representation of the weighted average working day and average hours for that year. I am quite willing to accept it.

(1120) It is absolutely necessary in the coal mining industry that to put the industry in order the operators know what their neighbors are paying. I do not profess to know anything about other industries.

With respect to the statement in the excerpts called "Coal detail statistics" in the Minerals Year Book, 1934, that the average number of days lost on account of the strike in 1933 was in Ohio 2 days and in West Virginia 1 day per man employed, whether that is a fair representation depends largely on the way one would care to put it. It is extremely difficult for some people sometimes to understand what one day per man employed really means. There were sections of Pennsylvania where we had no serious strikes. There were sections of Ohio where we had no serious strikes. There were sections in West Virginia where we had no serious strikes; and yet other portions of those three states were seriously affected and tied up for some time during the 1933 period. It was not a national strike conducted by any organization. Those were sporadic outbreaks taking place in individual mines, where men resorted to the strike weapon to force their employers to [fol. 586] negotiate with them. (1121) In the coke field, for example, in western Pennsylvania we had a strike situation involving 15,000 or 16,000 men. That strike was not brought about as a result of the refusal of the United States Steel Corporation at the outset to negotiate an agreement—or the Republic Steel or Wheeling Steel or any of the other

large steel companies—but the strike was precipitated by the companies' refusal to give the men a checkweighman. It lasted in that territory for several weeks, while other sections of the Pittsburgh territory were not affected. The same might be said of the northern field of West Virginia where we had local strikes. The same was true in the territory from which Mr. Carter comes, in the south. There were local sporadic outbursts on the part of the men. No strikes were called by the organization.

I would not say that the 1927 strike was a large, almost nation-wide strike. I would describe it in this way: The 1927 strike originally involved four states, perhaps five, including a portion of the northern West Virginia district, Illinois, Indiana, Ohio, and western Pennsylvania; but the 1927 strike in its inception in the western Pennsylvania and central Pennsylvania districts was not a 100% strike because the contract had already broken down. It had been abrogated by certain large producing companies. (1122) The Pittsburgh Coal Company, mining and producing some 12,000,000 to 14,000,000 tons of coal during that period, had abrogated its wage agreement. It had men [fol. 587] producing some coal but not all of the 12,000,000 to 14,000,000 tons. It was operating two or three days when it could operate because of the strike. The same was true with reference to the Buffalo, Rochester and Pittsburgh Coal and Iron Company, in central Pennsylvania, which is perhaps the largest commercial producer in that territory. Its mines were not affected 100% by the 1927 strike. The same was true of the Consolidation Coal Company in central Pennsylvania and in northern West Virginia. So, for purposes of production, I would not say that the 1927 strike tied up quite so much coal as did the 1922 or the 1919 strike. In 1927, as in the earlier strikes, the difficulty of the mine workers was that the non-striking territories continued to ship coal into markets that would otherwise have taken the coal that the men on strike would have mined if they had not been on strike. There is no question as to that. (1123) I would not say that that has been the really fundamental difficulty in securing national collective bargaining. These collective bargains, embracing a very substantial portion of the national tonnage but not being able, through their influence, to regulate wages and working conditions in the non-union territories ofttimes after a year, six months or

two years, severely felt the impact of the low wage scale in the non-union territories. The large buyers of coal would go to the non-union territory where the wage was low. They would exact a price considerably below the figure that could be submitted by the union producer who was [fol. 588] paying a higher wage. The union producer would continue to recognize the maintenance of that union wage just so long as his own economic situation might permit it, and then, driven by the force of circumstances, he would immediately abrogate his agreement and post a notice at his mine advising his employees that he would be obliged to reduce their wages to enable him to enter the market of his competitors operating on a non-union basis.

(1123) That has been the history of this thing. That has been its effect. That is what has led to these great industrial catastrophes. That is what has led to these riots, bloodshed, and killings in almost every coal mining village throughout the country.

(1124) Redirect examination.

By Mr. Lewin:

(1124-1130) [The witness identified and there were offered and received in evidence the following: Plaintiff's Exhibit No. 64—Executed lease of Pursglove Coal Mining Company, page 1250, Volume I, Hearings before Committee on Interstate Commerce, United States Senate; Defendants' Exhibit No. 27—Unexecuted lease forms contained in the hearings before the Committee on Interstate Commerce, United States Senate, on the following pages: Page 2119, 2111, New River Coal Company; page 2095, Cabin Creek Coal Company; page 2008, Brady-Warner Coal Corporation; page 2057, West Virginia Coal & Coke Company; page 1918, New England Fuel Company; page 1249, Jere Mine House.]

(1127) By the Court:

I have seen some of those agreements that were executed but most of them were forms that were presented to employees when they either sought a position at the mine or secured a position. The forms then had to be taken to the

company's office and duly executed, and signed copies left with the company and given to the individual.

[fol. 589] By Mr. Lewin:

(1128) The lease, Plaintiff's Exhibit No. 64, has been signed by Milton Austin.

By Mr. Whitney:

Milton Austin has been a prominent member of the United Mine Workers of America in the northern field of West Virginia for a good many years. I have known him for a good many years—a delegate at our conventions. I believe I saw the original of the lease when it was presented to the committee during the Senate hearings (1129). The reputation in the industry of the Pursglove Coal Mining Company for the treatment of its employees is just as good as any other company that I know of in the United States.

(1130) Recross-examination.

By Mr. Whitney:

Referring to the lease agreement of Mr. Austin's (Plaintiff's Exhibit No. 64) I cannot say that I am familiar with the house that was leased under the agreement (1131). I have no information as to the character of the house that would enable me to testify whether $4 per month was an excessive rent. I cannot say that I am familiar with the character of leases in that vicinity generally. I think that any kind of lease that is forced upon an employee under conditions such as that is highly unfair. I do not refer to the fact that either party may cancel the lease on five days' notice. I refer to the conditions under which the leases are [fol. 590] signed. That particular lease gave the Pursglove Company the right when a man quit their employment or was discharged for any cause whatever it may be to immediately vacate the house. The Pursglove Company operates in the Scots Run district of the Morgantown field. (1132) I suppose its mines are located some six or seven miles out of the City of Morgantown. All the houses in that community are near the mines. It is quite true that if all of the employees of the Pursglove Mining Company quit their employment with the company the effect would be

to stop production. A very small percentage of miners own automobiles. (1133) It is quite true that if the company could not find miners who were willing to walk or otherwise travel the six or seven miles from Morgantown it could not reopen if its miners should quit their employment, unless it could lease its houses to the miners who were going to work. These leases are used as a means of preventing men from holding membership or affiliation in any union labor organization during their employment with the company. I do not think companies usually resort to the evicting of 300 miners at a time. I cannot give any instance where they have evicted 300 miners at a time.

(1134) Further redirect examination.

By Mr. Lewin:

I know numerous cases where lesser numbers than 300 miners have been evicted. (1135) Those were cases involving these rental agreements or leases where employees sought the right to join unions and to attend meetings and they were immediately discharged and when discharged were immediately evicted from company houses. I am not personally familiar with the evictions mentioned in the Red Jacket case.

[fol. 591] FREDERICK E. BERQUIST, a witness called on behalf of defendants, first being duly sworn, testified as follows:

Direct examination.

By Mr. Critchlow:

(1153) At the present time I am in charge of the bituminous coal section, Division of Review, N. R. A. I have been in charge of statistical research and economic work of the N. R. A. since its inception, for the bituminous coal industry. I have had complete charge of the work relating to statistics and economic analyses during the pre-code period for the purpose of assisting in the formulation of the code, and during the period of the code relating to such statistics as were gathered by the N. R. A. with reference

to wages, costs and realization of the bituminous coal industry. At the time of the passage of the N. I. R. A. I was a member of the staff of the Coal and Coke Statistics Section of the Bureau of Mines and was transferred from that position to the NRA to carry on their economic and statistical research work. I was a member of the staff of the Bureau of Mines for 15 months. (1154) Prior to that I had charge of the decennial census of mines and quarries for the year 1929. I was with the Bureau of the Census from the Fall of 1929 to the Spring of 1932 at which time I joined the staff of the Bureau of Mines. From 1926 to 1929 I was assistant and associate professor of industrial economics at Carnegie Institute of Technology, Pittsburgh, handling courses relating to natural resources and industrial eco- [fol. 592] nomics. Prior to that I was graduate student in economics in Washington doing much of my work in connection with the Bureau of Mines.

[fol. 593] (1166) FREDERICK E. BERQUIST, heretofore called as a witness on behalf of defendants, resumed the stand and testified further as follows:

Direct Examination—Resumed.

By Mr. Critchlow:

[There were offered and received in evidence the following: Defendants' Exhibit No. 28—Chart entitled "Comparison of total tons loaded at mines for shipment to selected competing states, 1913-1934"; Defendants' Exhibit No. 28-A—Table entitled "Bituminous coal loaded at mines for shipment to selected states and the percent of coal tonnage of those states loaded in each of the component states, 1913-1934"; Defendants' Exhibit No. 29—Table entitled "Shipments of bituminous coal to tidewater, 1920-1934, inclusive"; Defendants' Exhibit No. 29-A—Table entitled "Shipments of bituminous coal to Lake Erie, 1920-1934, inclusive"; Defendants' Exhibit No. 29-B—Table entitled "Shipments of west-bound coal from Appalachians, and from Illinois, Indiana and western Kentucky"; Defendants' Exhibit No. 29-C—Table entitled "Bituminous shipped to New England by rail and by northern and southern ports, 1919-1934, in tons"; Defendants' Exhibit No. 30—Table entitled "Index of tons loaded at mines for shipment

and realization during the period of the Jacksonville agreement for selected states, 1924-1929"; Defendants' Exhibit No. 30-A—Table entitled "Index of tons loaded at mines for shipment and realization f. o. b. mine for selected com- [fol. 594] peting states, 1923-1933"; Defendants' Exhibit No. 31—Statement entitled "Comparison of production and realization, f. o. b. mines, between two groups of states east of the Mississippi River, 1923-1933"; Defendants' Exhibit No. 31-A—Chart entitled "Comparison of production and realization f. o. b. mines between two groups of states east of the Mississippi River, 1923-1933"; Defendants' Exhibit No. 32—Chart entitled "Comparison of average hourly earnings between two groups of states east of the Mississippi River, for specified years, 1919-1933"; Defendants' Exhibit No. 32-A—Statement entitled "Comparison of average hourly earnings between two groups of states east of the Mississippi River, for specified years, 1919-1933"; Defendants' Exhibit No. 33—Chart entitled "Number of mines in selected areas in which trackmen were paid rates falling in specified wage intervals, May, 1933"; Defendants' Exhibit No. 33-A—Table supporting No. 33; Defendants' Exhibit No. 34—Statement entitled "Number and percent of mines in selected areas in which outside common labor was paid rates falling in specified wage-rate intervals, May, 1933"; Defendants' Exhibit No. 34-A—Chart entitled "Number of mines—selected areas—in which common labor was paid rates falling in specified wage-rate intervals, May, 1933"; Defendants' Exhibit No. 35—Statement entitled "Importance of bituminous coal in freight railway traffic"; Defendants' Exhibit No. 36—Tabulation entitled "Annual bituminous coal production, state totals and their proportion of total United States, 1913-1934".]

[fol. 595] (1167) There have been major shifts of tonnages from one producing state to other producing states in the period since 1923. The most conspicuous example is the shift from states north of the Ohio and Potomac Rivers to the states south thereof, the states to the north being Illinois, Indiana, Ohio and Pennsylvania, and those to the south being Kentucky, West Virginia and Virginia. These displacements are illustrated in Defendants' Exhibit Nos. 28 and 28-A. (1168) The table, Defendants' Exhibit No. 28-A, gives the tonnage of bituminous coal loaded at the

mines for shipment for seven selected states, and the percent of total tonnage that each of these states loaded in each of the years 1913 to 1934. This group of states represents a major competitive unit in the coal industry and represents normally about 87% or 88% of the total production in the industry. The chart has been prepared on a percentage or index basis to simplify the presentation of the table. The perpendicular length of the chart for the various years represents 100% of the shipments for the seven states and the portion that each state received is represented by the band extending across the sheet in different shadings. Substantially, there was no shift in tonnage from the north to the south during the period from 1913 to 1921. It was a period in which both sections were gaining in tonnage but relatively they remained about the same. There was no marked change.

(1169) I have been engaged in a study of the trends in the coal industry for some years. It has been my principal [fol. 596] duty in connection with the NRA to make studies over this period of years. I have been head of the bituminous coal unit of the Division of Research and Planning, latterly known as the Division of Review. My duties with the Bureau of Mines had to do with the compilation of statistics on an annual, a monthly and a weekly basis, and the various services the Bureau of Mines performs in connection with the coal industry along statistical and economic lines. (1170) In the Bureau of Mines I had charge of the decennial census of mines and quarries which covers every comprehensive data relating to companies, employment, etc., for the bituminous coal industry, which, on the decennial basis, is probably the most comprehensive and detailed survey made of the mineral industries. At the time of my transfer to the NRA I was required to collect, compile, analyze, and present all the known relevant data with regard to bituminous coal that we could get our hands on, both official and private, and we compiled and presented in report form for NRA practically all manner of information relating to the coal industry that had a bearing upon the establishment of the code. That study covered primarily the post-war period but went back as far as 1882, (1171) when the Geological Survey began collecting figures.

I think the peak (showing the percentage of production in southern states) shown in Defendants' Exhibit No. 28

for the year 1922 was predominantly caused by the major strike which occurred in that year. It was a strike of long duration and covered a great deal of territory, particularly [fol. 597] in the states north of the Ohio River. In the year 1923, Kentucky, West Virginia and Virginia contributed 36.1% of the total for the selected group of states in bituminous coal loaded for shipment. In 1926, the corresponding percentage was 47. The maximum percentage of the total for the southern group was reached in 1927, when it was 53.9%. That was the year of the great strike which came at the expiration of the Jacksonville agreement on March 31, 1927. The following year, the percentage dropped back again (1172) as it dropped in the year 1923 as compared to 1922, after the strike at that time. The strike in 1927 had little effect on the total shipments of coal. For the year as a whole the coal produced was quite adequate for the demand and for the country as a whole. It had considerable effect on the relative proportions between the groups of states. As indicated in the chart, there was a very sharp rise in 1927 as compared with 1926 or 1928. In 1927, the percentage of the total for the southern group of states was 53.9% and in 1928 was 50.4%. There again was a strike in Illinois and Indiana and part of Ohio, which affected somewhat the production of those states and correspondingly resulted in a greater share to the southern states. This was in 1928. In 1932, on March 1, the contract in effect in Illinois and Indiana expired and there was a strike of some months' duration. There was also a strike in part of Ohio, (1173) which affected the share of the total tonnage enjoyed by the north. In 1933, the percentage for [fol. 598] the southern states was 50.2% and in 1934 it was 48.9%.

In the southern group, Kentucky, West Virginia and Virginia, the percentage of the total shipments increased from 36.1% in 1923, to 50.2% in 1933. Conversely, the shipments in the northern states declined from 63.9% in 1923 to 49.8% in 1933. Comparing 1923 to 1929, the shipments in the northern states decreased 52,800,000 tons, whereas the shipments increased in the south 50,300,000 tons. This is a comparison between those two particular years, not a cumulative figure of any shift.

(1174) Defendants' Exhibit Nos. 29, 29-A, 29-B and 29-C show particular movements, namely, coal moving to tide-

water, coal receipts in New England, the lake-cargo-coal movement and the all-rail west movement. Roughly, they indicate for those specific movements, much the same as is shown in the chart, Defendants' Exhibit No. 28. Most of the coal that is produced in the three southern states moves to outlets north of the Ohio and Potomac Rivers, and New York and New England generally. They would consequently reflect very much the same type of shift. (1175) The percentage those mines have increased from the southern states and declined from the northern group relatively indicates the trend. That is accentuated in certain years of strike. The most striking table is that for coal shipped to New England by rail and by northern and southern tidewater ports for the years 1919 to 1934. New England re- [fol. 599] ceives its coal both by rail and water, all-rail shipments originating in Pennsylvania and northern West Virginia, with a slight amount from Maryland, and we note that for that movement, as between 1923 and 1933 there was a decline in percentage from 41.9% to 29.7% of the total coal shipped to New England. With respect to tidewater shipments made from New York, Philadelphia and Baltimore of coal originating in Pennsylvania, northern West Virginia and Maryland, we find a similar decline over that period from 16.1% in 1923 to 4.9% in 1933. With respect to the tidewater shipments to New England going through Hampton Roads and Charleston, we find in that same period the shipments in 1923 amounted to 42% of the total shipped to New England, (1176) while in 1933 they represented 65.4%. The coal shipped through those two ports originated in Virginia, southern West Virginia and a little in east Kentucky. In the case of the Great Lakes movement, the proportions have narrowed somewhat from 1928 on, but are not nearly back to what they were in the earlier years.

Defendants' Exhibit No. 30-A shows coal loaded at mines for shipment and the average value per ton f. o. b. the mine for the years 1923 to 1933 and the figures for shipments and for value, each being placed upon an index basis with 1923 as a base. That is done for each of the states. (1177) Value is the same as mine realization price, being the total realization divided by the number of tons involved. The [fol. 600] chart, Defendants' Exhibit No. 30, is prepared on the basis of the data contained in the table. The table

has been reduced to chart form to simplify its presentation. The chart is on a relative basis, the year 1923 being used as the base year, shipments for 1923 representing 100%. The shipments for succeeding years are shown as a ratio of the shipments in 1923. For example, the shipments in 1923 from Pennsylvania were 138,036,000 tons. That is represented by 100% on the chart. The succeeding year, 1924, the shipments were 110,000,000, represented by an index number of 79.9. (1178) The same is done for West Virginia. The same procedure is followed with respect to realization. The realization for Pennsylvania in 1923 was $2.75 and that is represented by 100% on the chart. For 1924 the Pennsylvania realization was $2.26, which is 82.2% of the realization for 1923, and is represented correspondingly on the chart. For each of the respective states, the year 1923 is used as a base, both in the matter of shipments and in the matter of realization. (1178) In this way it is possible to note what has happened in terms of realization of each State, compared with any other State, and of shipments for each State, compared with any other State. You can then note the manner in which each has progressed over that period of time, in relation to the other. 1923 was used as the base year because it was the next relatively normal year after the war period. We had a period of war control and in 1919 the period of the strike. In 1920 there was a period of abnormal car shortages. 1921 was a rather acute post-war depression. 1922 was featured not only by strikes but by car shortages. 1923 was a year affected very little by strikes. (1179) There was less than two days average time lost by strikes. It was a year of good general busi- [fol. 601] ness prosperity for the country as a whole. It was a good year in the coal industry. The car shortages had largely disappeared by the second quarter, and the last half was practically free of it. Wage rates in the south were very close to those in the north, or at least were relatively as close as for any year we have had. It was a year also of peak capacity in the industry and preceded the general period of liquidating in the industry. The succeeding year the industry experienced falling prices, unstable labor conditions, differentials in wage rates, etc. On the whole I think 1923 the fairest year to use as a base. (1180) The period from 1923 to 1927 covered by the chart was a period in which the most striking example of shift has taken place.

From 1924 to 1927 was the period of the Jacksonville wage agreement. Comparing Pennsylvania and West Virginia on the chart, it will be noted that for both there was a rather sharp decline in average mine realization in the year following 1923. The decline for Pennsylvania was much less than that for West Virginia, namely, to 17.8%, whereas the decline for West Virginia amounted to 31.3%, as compared with the previous year. The disparity comes into the picture in 1924 and continues throughout the period with some deviation. The West Virginia level generally throughout the period remains lower than that for Pennsylvania. In 1926, the disparity is not so great; the spread has narrowed slightly which is accounted for, I think, by the fact of the British coal strike which resulted in a windfall for Ameri- [fol. 602] can coal business, (1181) as well as by the after effects of the anthracite strike which began in September, 1925, and lasted until February 26. 1926 also was a very high year of production in the bituminous coal industry, I believe the second highest in its history, second only to the year 1918. Similar disparities of realization are observed in the chart comparing Ohio and West Virginia, Ohio and Kentucky, Indiana and Kentucky and Illinois and Kentucky.

It will be noted that with respect to shipments the lines are reversed, that is, whereas the level of prices remains higher with respect to the index for 1923 for Pennsylvania as compared with West Virginia, the reverse is true with respect to shipments. The line for Pennsylvania drops below the average for the base year 1923, whereas that for West Virginia rises greatly. The spread for the last year, from 1926 to 1927, reflects in part the effect of the strike in 1927 following the expiration of the Jacksonville agreement. Relatively, the lines shown and the data given are not as striking in the comparison of Pennsylvania and West Virginia as for some other combinations. All show quite striking trends and disparities. The spread which is noted in realization is less than that for shipment, which bears out the fact in the coal industry that minor shifts in prices may cause substantial shifts in shipments or production. While the trend does not increase in prices and does increase in shipments the effect of the differential in [fol. 603] prices accumulates. Contracts for shipments expire and when it is time for renewal there is opportunity

to take advantage of the better market. A margin carried over a length of time results in cumulative effects until the point of equilibrium is arrived at. (1183) 1924 to 1927 was the period of the Jacksonville agreement in the north with the basic level of $7.50 a day. During that period the relationship in southern wage rates did not maintain itself as it had earlier. In 1923 wage rates were relatively close in the south to those in the north but after 1923 they broke rather sharply and were free to break, whereas during the Jacksonville agreement the northern states were not free to break in their wage rates. There are exceptions to that with respect to the breaking away of western Pennsylvania in 1925 and some other breaks, but on the whole the level of wages and wage costs per ton was carried through.

Exhibit 31-A shows the situation with respect to prices and shipments between the two groups of states referred to from 1923 to 1933. (1184) The chart is based upon Exhibit 31 which is a table. The chart is prepared on the same basis as Exhibit 30. It extends the period through to 1933 and groups states north of the Ohio—Illinois, Ohio, Indiana and Pennsylvania as Group A, and Kentucky, Virginia and West Virginia as Group B. There are the same trends for the groups as for the individual states, namely, a sharp price decline after 1923, the greatest being for 1924 and 1925. There is a stiffening in 1926 and a continu- [fol. 604] ing decline throughout the following period and a slight increase at the end reflecting the coming of the code in October, 1933, (1185) at which time prices were materially increased. The converse of the realization part of the chart is shown on the upper half in terms of production. This is in terms of production rather than shipments but the difference between the two is very slight and not material. There we note the trend for the period of 1923 to 1927 which is shown in the individual groupings. After that time there is a running together of the lines of production, the widest point being in 1927, which was due in part to the strike and in part to the cumulative effect which I have explained. In 1928, the lines have narrowed considerably and in 1929 they have narrowed some more, and so on. These are years in which the northern group of operators—Ohio and Pennsylvania—were free from the Jacksonville wage scale and were therefore able to reduce their costs and effect, relatively, breaks in prices which are

fairly constant for 1925 and 1926 but have a rather sharp break in 1927 after the expiration of the contract, which permitted them to reduce their prices. 1928 was somewhat affected by a strike in Illinois and Indiana which undoubtedly favored the Group B states for that period. (1186) Going on from 1929 the two lines converge very markedly. Wage scales had dropped considerably in the north. Much of it had gone non-union and in 1928 the contract that was renewed in Illinois and Indiana had been reduced from [fol. 605] $7.50 to $6.10 a day. After that period there is a narrowing of the two trend lines of production. At the end of the period there was a very considerable disparity as compared with the beginning of the period. The index of average value shows a drop from 100 in 1923 to 51.9 in 1932, a drop of 48.1%, in average realization for Group A or northern states. In the southern group the corresponding decline was from an index of 100 in 1923 to 39.9 in 1932, or 60.1%. In 1933, the figure was the same for Group A or northern states, namely, a decline of 48.1%, while in Group B or southern states the decline was 56.7%.

(1187) Exhibits 32 and 32-A compare the wages paid in the same groups of states from 1923 to 1933. The idea for all of the preceding charts are from the reports of the United States Bureau of Mines. The hourly earning data contained in Exhibit 32-A are from published reports of the United States Bureau of Labor Statistics. (1188) The data are derived from reports for particular pay periods which fall within certain limited periods of time. In 1919 those reports were gathered from the operators in the period from January to May. The next canvass was made in the winter of 1921-1922, between October 1 and February 15. The next was in the fall of 1924. The next was in the winter of 1926-1927. The next was in the first quarter of 1929. The next was in the first quarter of 1931. The next was in February, 1933. The Bureau of Labor Statistics sends out field men to collect these data. The men go from [fol. 606] mine to mine in the manner required for comparable purposes by the Bureau. They are not taken at the same point of time but are taken within those periods and represent a pay period within that time. (1189) Most of them are taken around a mid point. The sample is quite extensive. The published report for 1933 was at our instance in connection with NRA. The extent of the sample

is approximately one-third of the total men employed and of the total tonnage produced. They have used every effort to make them representative as between the union and non-union mines and for various parts of the states covered. The upper portion of the chart relates to the average hourly earnings of employees, shown in three parts: for all men, for tonnage men, and for day men. The points plotted indicate the cents per hour average earnings. The two groups of states are (1190) a combination of Illinois, Indiana, Ohio and Pennsylvania, on the one hand, and Virginia, West Virginia and Kentucky on the other. Between 1919 and the period of 1921-1922 there is a substantial increase in the hourly earnings of day men in both groups; in fact, the increase is approximately the same. Considering Group A first, the northern group, we find that the line of earnings remains relatively level from 1922 until the winter of 1926-1927. The lines on the chart do not indicate trends but merely connect the points of observation for the various periods. The next point is 1929 and we note a very marked decline in the average hourly [fol. 607] earnings for Group A. Continuing to 1931, the decline goes somewhat lower and from 1931 to 1933 there is a very drastic decline. Turning to Group B, the first period indicates the same relative increase but in the interval between 1921-1922 and the fall of 1924, there has been a very marked decline in the average hourly earnings of day men. (1191) This is the period when the Jacksonville agreement came into being. The southern rates of 1923 were relatively close to the northern rates, but in the interim there has been a considerable drop, most of which has taken place after the signing of the Jacksonville agreement. (1192) The northern states were tied to a contract and the southern states were not. As a matter of fact I believe that in the interim between 1922 and 1924 the average hourly earnings were somewhat higher than are shown in the chart. (1193) The day men are paid by the day or the hour and the tonnage men are paid by the piece. There are no deductions for outside day men. For inside day men there are such items as the charge for carbide or for the rent of electric lamps. For tonnage men there are what is known as the occupational deductions, including such items as powder, smithing and the lamp, which are the principal items. (1194) Each one of the lower blocks in Defendants'

Exhibit 32 refers to the upper block in which the ratio of the hourly earnings of Group B, the lower line, is shown as compared with the earnings for Group A. (1194) In other words, the ratio of the hourly earnings in Group B as compared with the hourly earnings in Group A in 1919 is 86.8 percent.

Then, at the next observation in 1922 the ratio is 91.6. In the next observation in 1924 we have a sharp break. We notice that the ratio of Group B to Group A has fallen very much, to 79 per cent. At the next point of observation, 1926 and 1927, it is shown that the ratio has dropped still further to 77.9 for the lower group as compared with the upper group. The two have come close together. The ratio is then 87.1. (1195) There was a great disparity as of the observation for late in 1924 and also for the winter of 1926 and 1927 and that disparity narrowed very considerably at the time of the next observation. In this period the northern group hourly earnings dropped very mate- [fol. 608] rially and the southern group continued to drop. At the next observation they hold relatively the same relationship and in the last period (1931-1933) in which the depression deepened very materially, we find this very marked drop in both curves, expressive of the fact that the lines rather chase each other downward and that when rates were reduced in one instance they were reduced in the other, each being to the other cause and effect, each dropping as the other dropped, with the result that at the end of the period, the hourly earnings in the southern group dropped from a high at the observation of 1921-1922 of approximately 70¢ an hour down to a level of about 38¢ per hour. Likewise the observation for 1921-1922 for the northern group has dropped from 80¢ down to approximately 48¢ an hour in 1933. The figures and the trend for the tonnage men follow much the same as that for the day men. The disparity does not appear to be quite as great but, nevertheless, the disparities occur at the corresponding points. (1196) The drop for the tonnage men was much greater than for the day men. The average for tonnage men for Group A 1921-1922 was 93.6¢ an hour, and in February, 1933 it was 44.8¢, a reduction of more than half for that period. In Group B there is a drop from 91¢ to 37¢. In 1919 the time counted for the tonnage men was the total time spent in the mine. Beginning in 1921 it was

the time at the face, including lunch, so that at that time a longer period was counted in the days worked, and used as a divisor, thereby somewhat reducing the observation in 1919 as compared with what it would have been on the [fol. 609] basis of the years 1921 and thereafter. That does not materially affect the presentation except that had it been on the same basis these points would have been slightly higher. The figure in the first column is a composite of the two figures, that is, tonnage and day men, weighted according to the proportion of men in each class. (1197) The average for all men for Group A, 1921-1922, was 89.4¢ per hour and in 1933 it was 45.8¢ per hour, a drop of 48.6%. For Group B the average for all men in the earlier period was 81.9¢ and in 1933 was 37.4¢, a drop of 54.3%. (1198) The northern line is relatively constant because of the northern union basic wage rate of $7.50 a day going back to 1920 and continuing with the signing of the Jacksonville agreement in April, 1924. There is a slight decline due to the fact that some of the companies, notably the Pittsburgh district of western Pennsylvania, did break away. The effect of these instances of breaking away resulted in somewhat lowering the line during that period. In contrast with that, as far as the southern group is concerned, the sharp drop that is indicated between 1921-1922 and 1924 reflects the break that took place primarily after the signing of the Jacksonville wage agreement, in the summer and fall. They continued further in 1927. At the expiration of the Jacksonville agreement or thereafter was when the sharp break took place in the north and there was a considerable corresponding break in the south. A large area in the north released itself from the contract and [fol. 610] was free to negotiate with the employees at lower wage rates and did so. (1199) That is observed in terms of the next observation of 1929 when the drop was very marked in the north and there was a further drop in the south, the two being very much closer together than during the period of the Jacksonville agreement. The next observation period in the first quarter of 1931 indicates a further break from 1929. From 1929 to 1933 was a period in which only about 20% of the production was organized compared with approximately 70%. In the latter period as one cut the other cut; there was no particular basis for wages; there was no uniformity of wages; there were many

rates, being just what they happened to be at the individual operation, whatever was found necessary. (1200) The period from 1927 to 1929 was a period of declining wages throughout the country generally in the coal industry, as shown by the charts. (1201) In February, 1933, the average hourly earnings for all men in Group A states was 45.8¢ per hour and for Group B states was 37.4¢ per hour. An eight hour day for Group A would be about $3.66 a day and for Group B about $2.90. There was no uniformity of wage rates in the non-union area. At least, in May, 1933, for which time we have an observation taken by the NRA, there was a great disparity in the rates paid at different times within given areas and as between areas. I went with the NRA on July 1, 1933. There were surveys made at or about that time on employment and earnings for the industry in the months of November and December, 1933, for a number of areas and some beyond that time, but there [fol. 611] was a comprehensive survey made of rates in November and December, 1933. (1202) At that time also we made a survey in respect to rates in May, 1933. We prepared elaborate forms for the collection of data for the coal industry and one form in particular was devoted to collecting data on employment and earnings of the workers in the industry. In the December, 1933, canvass we requested operators to report the wage rates in effect in May, 1933. There were eight or ten or possibly a dozen classifications of day men and the customary classifications of tonnage men. The reports called for rates paid under NRA and the corresponding rates paid in May, 1933, the latter taken as a period of observation prior to such wage increases as came about during the summer of 1933 under the President's Reemployment Agreement and other urges to increase employment and wages during that summer, so it reflects probably the low point of wages prior to the adoption of the code. (1203) The data so obtained as to rates paid in May, 1933, is embraced in composite form in Defendants' Exhibit No. 33-A. Defendants' Exhibit No. 33-A is a chart illustrating the information given in the table. Exhibit 33 relates to trackmen and Exhibits 34 and 34-A relate to common labor. In May, 1933, there was a considerable disparity of wages paid by mines within the various areas. (1204) The charts refer to areas in western Pennsylvania, eastern Pennsylvania, Ohio, West Virginia,

southern subdivision No. 2 and Alabama. Those were subdivisions under the code, Alabama being a division. We [fol. 612] did not obtain information from some areas, one of which was the Smokeless area, known as southern subdivision No. 1. Others were Michigan, western Kentucky and the Panhandle of West Virginia. There are no data shown for Illinois and Indiana because they were on a contract basis at the time on a basic $5 wage basis which was not disturbed when the code came along. Taking western Pennsylvania, in the trackmen classification, we find that in the rate per day of $1.50 to $1.74, one mine appears. (1205) The intervals set up are of 25¢ each. In the interval from $1.75 to $1.99 three mines appear; in that from $2 to $2.25 18 mines appear; in that from $2.25 to $2.50 27 mines appear, etc. One extreme is mines having a basic rate of $4 and over and the other extreme is $1.50 to $1.75. There is a block of 18 mines whose basic rate fell between $2 and $2.25 and 16 mines with a basic rate within $3.50 to $3.99. The same dispersion is shown for each of the groups and gives a picture of the non-uniformity of rates paid. Substantially the same effect is shown for common labor, except that there is a large proportion that falls to the lower end of the scale because the common labor rate is normally lower than the basic inside scale rate. During that period (1206) the mines were competing with one another under widely different rates—$3 or $4 against $2. This is within each of the districts, not as between districts, it being intended to show what the dispersion was within each of the districts. It is obvious that there must be [fol. 613] many strange depressions as between operators at different levels in their competition since as a result of these different rate levels you will get widely different costs of production.

While with the NRA I compiled statistics having to do with labor costs and realization from November, 1933, through January, 1935, during which it covered practically all of the industry. (1207) Certain of that information is summarized in two tables I have prepared. [There were offered and received in evidence the following: Defendants' Exhibit No. 37—Statement entitled "Labor cost per ton, May, 1933, compared with labor cost per ton 10 months April 1934 through January 1935; realization per ton, Janu-

ary through September 1933 as compared with realization per ton, April 1934 through January 1935''; Defendants' Exhibit No. 37-A—Statement entitled ''Ratio of commercial production in subdivisions of divisions 1 and 2 to total of these divisions, 1933 and 1934; and average total cost, realization, and margins during the 10 months period April 1934 through January 1935''.]

(1208) Where the spaces are left blank in Exhibit 37, no data were reported. A very substantial proportion of the industry submitted reports for the different months in which these data were collected. That is shown in Defendants' Exhibit No. 37-A. We have indicated there for the 10 months period April, 1934, to January, 1935, what the percentage of coverage was, first related to commercial tonnage alone, and then also showing the percentage of coverage including captive. You will note those in columns 7 and [fol. 614] 8 on Defendants' Exhibit No. 37-A. They vary from area to area but are very substantial representations, ranging from a low in southern subdivision No. 2, (1209) the southern high volatile area of 61.8% of total commercial tonnage, to a high of 95.9% in southern subdivision No. 1, the Smokeless area. (1210) On Defendants' Exhibit No. 37, picking up the line for Southern No. 1, you will note that in the first column we have no information as to the labor cost per ton in the pre-code period. The labor cost per ton as reported for December, 1933, was 96¢. If you will skip over to column No. 9 headed ''November, 1933, through March, 1934'' you will note that the labor cost per ton for the whole period for which we have data under the code prior to the amendment to Amendment No. 1, which was adopted in April, 1934, was an average of 94.3¢. The next column shows what the labor cost per ton was after the amendment of April, 1934. (1211) In April, 1934, an amendment to the code provided for an increase in the wage rate and also a shortening of hours from 8 to 7, resulting for southern subdivision No. 1 in a wage cost level per ton of $1.146 during that period. The figures for realization for the period of January to September, 1933, are arrived at by process of deduction and elimination. The Bureau of Mines published the realization per ton for these different areas on the basis of the captive tonnage, the commercial tonnage and part captive and part commercial. The figures under the code were based upon the reports of

[fol. 615] commercial operators since captive operators were not required to or did not report their information. In order to make the material comparable it was necessary and desirable to remove from the realization for 1933 the effect of the captive tonnage. That we have done. (1212) In Defendants' Exhibit No. 37-A, column No. 1 is production in thousands of tons for 1933. Column 2 is production in thousands of tons for 1934, representing commercial production as reported by the Bureau of Mines. Column 3 shows the proportion for each subdivision out of the total for divisions 1 and 2. Column 4 represents the same thing for 1934. To show how each area fared in 1933 as compared with 1934 all we need to do is compare the percentages that each area enjoyed in each of the years to see what happened in the year entirely under the code and the year in which the code operated for only 3 months. The changes are not very great. In fact, the relationships are quite constant. Column 5 is the estimated commercial tonnage for the period April 1, 1934, through January, 1935, excluding captive tonnage, (1213) as estimated in my division. The next column shows the tonnage actually reported through the whole division. The next shows the percentage of reported tonnage to the estimated tonnage, and the next the percentage including the captive mines. Column 9 is the average total cost which includes all items of cost, both direct operating costs and selling and administrative costs, but it does not include capital cost, interest on borrowed funds or bonded indebtedness. In includes depletion and allows for depreciation on the basis used by the Internal Revenue or [fol. 616] reported for income tax purposes. The next column represents the total receipts divided by the total tonnage. The next column represents the margin between the average mine realization and the average total cost.

[fol. 617] (1214) ISADOR LUBIN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lewin:

I am a United States Commissioner of Labor Statistics and have been since July, 1933. Between 1922 and 1933

I was a member of the staff of the Institute of Economics of Brookings Institution and of the (1215) Brookings Graduate School, until 1926, when it was merged with the Institution. Prior to that I taught economics at the University of Michigan. Prior to that I was an economic expert in the War Industries Board and with the Food Administration during the period of the War. Prior to that I taught economics at the University of Missouri. For several years, while connected with the Brookings Institution I worked on the problem of bituminous coal and the problem of labor in that industry. In 1923 I published a book called "Miners' Wages and the Cost of Coal". In 1924 and 1925 I spent most of my time investigating the British coal industry. I published a volume called "The British Coal Dilemma" in 1927. I have kept in touch with the bituminous coal industry as part of my regular work at the Brookings Institution, through contact with people in the industry and through contact with literature of the industry. After becoming a part of the United States Department of Labor, and reviewing investigations made by our Bureau into [fol. 618] wages in the bituminous coal industry I have always had my hand on the situation. (1216) From 1923 until the advent of the NRA in 1933, the industry has been approaching a decaying state. Whereas manufacturing as a whole was growing, the output of the manufacturing industries was increasing, the employment in the manufacturing industries was increasing and payrolls in the manufacturing and service industries were increasing; in the coal industry the reverse situation was taking place. The number of people on the payroll was declining, the actual payroll was declining, and the wage rates and earnings of the miners were declining by and large. That was the general trend. The situation, I think, is the result of a series of causes. The first is the over-capacity that has prevailed in the industry for many years which has brought about the situation where competition has been exceedingly keen. In addition, you have a unique situation in coal as compared with other industries. In the first place, labor costs comprise 60% or more of the total production costs. (1217) This is greater than for any other industry for which the Census has any record. The only other industry approaching the coal industry in the importance of labor costs to total production is the railroad repair shops in-

dustry, where there is an artificial situation, mostly repair work. Materials play no part in costs. There is no other industry in which labor is so important a part of the cost as in coal. The next in line would be clay products where approximately 36% of the cost is labor. In manufacturing [fol. 619] as a whole it is 20% as compared with 60% in coal mining. That situation creates an interesting dilemma because labor costs are so important in the production costs in this industry. There are very few other sources upon which the employer can bring pressure to cut his costs. He must cut his costs almost without exception on labor. He cannot cut taxes and insurance. It is difficult to cut overhead. In the other industries the reverse is true.

If in the coal industry there is a situation of over-capacity, with certain producers cutting their prices, other producers have two alternatives: First, to continue to produce at a loss and second to cut costs, the only place in which costs can be cut significantly being in the field of labor.

(1218) Another factor which makes it difficult for the average coal producer to keep his price within the realm of cost is the problem of shutting a mine down. There is a very distinctive situation in coal mining. When an employer of labor in a factory finds that the price of his product is not sufficient to cover his costs, if he cannot cut his costs in any other way he shuts down his plant. He has certain costs that continue while his plant is shut down, his insurance, depreciation, etc. On the other hand, in mining, it frequently costs almost as much to shut a mine down as to keep producing at a loss. When a factory is shut down it is shut down completely. When a mine is shut down it is necessary to keep pumps going, for if there is a flood the mine may be ruined. It is necessary to have day men down below watching the roof. If there is a fall costs will be way up. It is necessary to watch out for gas because [fol. 620] explosions may occur. Often the mine is shut down but overhead continues. The result is that many operators find it cheaper to operate at a loss than to shut down. If an operator's competitor cuts his prices the operator will either continue to produce at a loss, meeting his competitor's price, or cut wages and make his labor bear the brunt. Usually he has been forced either to continue at a loss and then eventually find himself forced to cut his wages or cut his wages from the very beginning

and meet his competitor's price, hoping he will make enough to break even.

(1219) I have seen a study of the ratio of wages paid to the value of product in the major industries in 1929 prepared by Mr. F. G. Tryon and Mr. W. G. Young of the Bureau of Mines, and this illustrates the point I make very definitely. I have made similar computations myself. These are the census figures showing the total wages paid in each of these industries, the value of the products in these industries, and the ratio of wages to the value of the product. The two coal industries, both bituminous and anthracite, stand by themselves in the sense that wages approximate 60% of the total value of the product. The next industry that approaches that figure in any degree is car and general construction and repairs in steam railroad repair shops, where the percentage approximates 50%. The reason for this has already been stated. The other industries that anywhere near approach bituminous coal, but are a considerable distance away from it, are (1220) clay products, where the percentage is 36, lumber, 39, machine [fol. 621] tools, 35, and shipbuilding and repairs, 32. That study is a list of all industries paying more than $50,000,000 in wages in 1929 and all mine and quarry industries paying more than $25,000,000 in wages in 1929. [There was offered and received in evidence as Defendants' Exhibit No. 38, the above referred to paper entitled "Ratio of Wages Paid to Value of Product in Major Industries, 1929".]

(1221) In my opinion, based upon my knowledge of the coal industry of the United States and the coal industry of Great Britain and in part the coal industry of Germany and Poland, I doubt that there is any basis for hoping that the industry can by itself solve the situation as long as you have a condition where the productive capacity is far in excess of the maximum demand that has ever been experienced and where an employer can cut his costs, and consequently his prices, at will, in which event his competitors, in order to maintain their share of the output must do likewise because there are no other differentials which can be cut to lower costs. I see no possibility of the industry solving the problem by itself.

(1222) In my opinion, if these conditions are to be alleviated, two very essential steps must be taken. I think that

they are independent of each other. Each alone would bring about partial results. (1223) I have in mind, first, a unification of the wage scale determination in the industry. As long as over-capacity forces cutthroat competition and employers, in order to remain in existence or operate at [fol. 622] a loss, must cut wages to meet lowered prices on the part of their competitors, chaos will continue to reign. The competitive system is based upon the assumption that the efficient operator—efficient in terms of the quality of the product he gives to the public, the price at which he gives it, and the type of service he renders—will succeed in this race for gold or profit. If the purpose of having competition in industry is to make it possible for the most efficient operator to serve the public at the least possible cost, then efficiency rather than the ability to cut wages or sweat labor should be the determining factor, and it is assumed in all of our attitudes toward the competitive system that it is because we give the efficient producer the chance to get out on top that we maintain a competitive system. Experience has shown, however, that the business does not necessarily go to the most efficient operator. It goes to the operator who can cut his costs most and frequently that means the operator who can sweat his labor most and cut his wages most. (1224) If we are to have competition in the industry, we must have a plane of competition. We must fix the lower limits below which nobody can go and then the producers must compete with one another on the basis of efficiency and not on the basis of cutting wages below the minimum plane.

Another alternative is a device which might eliminate the pressure which operators now feel toward cutting wages, which might be the fixing of average minimum prices. There still will be the desire on the part of the [fol. 623] average employer to make as much profit as he can and perhaps to cut wages to increase his profit, but there will not be that determined pressure which gives him no alternative now to do anything else but cut wages, when prices are cut. By fixing average minimum prices one of the determining factors causing the cutting of wages is in large part automatically removed.

The effect of price-cutting in the industry during the last 10 years was evidenced by the charts previously submitted as exhibits, illustrating the shift of tonnage (1225)

from areas where wage rates were relatively fixed to others, and also in the types of market to which the coal from areas affected move.

The United States Government, during the War, was a stabilizing influence in the industry. It was likewise so during the NRA, and the only other stabilizing influence I have known was the United Mine Workers. During the period from 1898 to 1919 there was not a single large national strike in the industry. There you had a period of 24 years without a major strike, with the exception of 1919, when the Government control over the industry terminated. We had another strike in 1922 and another in 1927. Since then they have been more numerous. With the expiration of the Jacksonville agreement the number of the mine workers has been seriously affected. I think perhaps another illustration of the stabilizing effect of the organization was in the strike of 1922, when the situation was very acute. There was a contract in the State of Kentucky with certain operators which had not expired at the time the contracts in other areas had expired, and despite the fact that [fol. 624] the United Mine Workers prohibited their workers from continuing work in mines throughout the country, it insisted that its members in those mines where the contract had not expired should continue operations. One of the complaints I found as I wandered over the field of the strike was that miners generally in other areas on strike were (1226) complaining because the members of the same union were producing coal in Kentucky that was entering markets in competition with what they would have normally produced. Therefore, you have evidence of the stabilizing effect of collective agreements.

(1227) In areas where there is effective collective bargaining there has been fixed a lower limit below which wages and working conditions could not fall, thereby putting all operators on the same plane as far as labor costs were involved. This does not necessarily mean that every operator had the same wage scale. All it meant was that an attempt was made through collective bargaining to put all operators in the different fields of the country on a more or less uniform basis as regards labor costs. Adjustments were made for distances from markets. If the freight rate from a given area was higher than from another there was an adjustment in the wage scale to offset it. There were

adjustments for the type of coal, the thickness of seams, dead work, the amount of work which was necessary but indirect in the production of the coal. As a whole, through [fol. 625] universal collective bargaining the effect would be to put all operators on the same plane from the point of view of labor costs and thereafter permit the efficiency of the individual operators to determine which shall get the business and make profits.

I think the right of collective bargaining is essential from an economic standpoint and for the economic welfare of the industry. (1228) My reasons for believing this are due to my observation of the industry over a period of something like 15 years of activity in which I visited mining fields throughout the country and on which I have conferred with mine operators and employees. The industry in large part is of such nature that mines are located in isolated areas in particular fields. Unless there is some way of protecting the individual workers through collective bargaining they have no alternative than to yield to the demands of the operators because there is no alternative of employment in the community. It is not like a factory where he can turn from one field to another. Secondly, there must be considered the actual methods of operation and the determination of wages. (1229) The men are paid by the ton. Allowances are made for dead work, charges are made for powder and things of that sort. Because of the very complicated nature of the wage scale, the employer who may so desire can take advantage of the worker. In other words, he can cut labor cost on the worker without the worker knowing anything about it. The coal is loaded at the tipple. The miner does not know how much goes to the car. He does not know whether he is being given full weight unless he is provided [fol. 626] with a checkweighman. All of these factors have been proved in the past as being ways of cutting the actual labor costs. Unless there is some uniformity of control, the individual operator who does not have the ethics of his competitors can take advantage of them by cutting his wage costs. These are reasons definitely making collective bargaining peculiarly appropriate and necessary for this particular industry. There is also the fact that the wage costs are so significant a part that there is a tremendous advantage in cutting labor cost, because it gives an unfair advantage over competitors.

(1230) The condition in the coal industry has not been due solely to the current economic depression or the general depression which started in 1929. In 1929, when industry reached its maximum production, the coal industry had reached the point where it was employing 200,000 fewer workers than in 1923. While industry as a whole between 1919 and 1929 was increasing its payroll and wage rates, the bituminous coal industry was decreasing its total payroll and actually paid out much less in 1929 than in 1919. While industry as a whole was increasing its wage rates, (1231) manufacturing industries as a whole having increased their wage rates from 54.8¢ an hour in 1923 to 58.7¢ an hour in 1929, the average hourly earnings in the bituminous coal industry for that time fell from approximately 90¢ to 68.7¢.

[fol. 627] (1233) In view of the fact that one of the great factors causing demoralization in the bituminous coal industry is competitive wage cutting, the fixing of minimum prices for certain areas would remove one of the most important factors that causes employers to want to cut wages, namely, the fact that competitors, by cutting prices, force them into a situation where they are also compelled to lower prices. If there were a minimum average price, that practice would be in large part eliminated. (1234) This would be true even though all the elements of the cost of production, or some of them, are not controlled. Where 60% of total cost is labor cost, the other costs being fixed costs, and things of that sort, materials being a relatively unimportant factor, it would be absolutely necessary that the wage factor be controlled in order to bring about benefit to the industry from the price-fixing device.

Both the requirement on the part of coal operators that their employees trade at company stores and the requirement that their employees live in company houses are in a sense weapons whereby the employer may cut his wages indirectly. The operator may have a minimum wage rate and agree with his competitors to continue to pay that wage rate. According to his books he may have paid it but if, on the other hand, he can get that money back by compelling his employees to buy at his store and rent at the prices he [fol. 628] fixes, it becomes possible to get some of his wages back and thereby cut his costs. Although running his mine at a loss he might make enough profit at the store to offset

the losses. One hears of such instances. It is a form of indirect wage competition.

If prices are fixed and wages are not controlled it would be a tremendous improvement whereby you (1235) would eliminate the employer's desire to cut wages by reason of his competitors cutting prices.

[fol. 629] (1370) ISADOR LUBIN, a witness heretofore called by defendants, resumed the stand for cross examination, as follows:

Cross-examination.

By Mr. Whitney:

As to whether it would be a natural development in the coal-mining industry, for the number of workers to decline at a time when the use of coal was declining, I should say that if the use of coal was declining that would be the situation, but the fact was that between 1923 and 1929 the decline in the number of people employed in the industry was much faster than the decline in the use of energy furnished by coal. When I said the industry was decaying that was with reference to the general situation in terms of profits, opportunities for employment of miners, opportunities to earn money, wage rates, and the general economic situation in the industry. (1371) The improvements in economy and efficiency in the use of coal accounted for the decline in the production of coal but did not account for the fact that employment decreased proportionately much faster than the use of coal. There were economic improvements in the methods of mining coal being introduced to the mines which made it possible to mine coal with fewer men per ton produced, but not in rate sufficiently to justify a decline between 1923 and 1929 of 200,000 men. I could not say off-hand whether the men were working more hours in the year 1929 than they had been in 1923. I would say that the decrease [fol. 630] was not relatively greater, if there was any, but if you take the intervening years you will find that there was more irregularity and less work in many fields of the country. When I say there has been a decline in working opportunities, I am talking about such decline (1372) for the people associated with the industry. Those who were left in the industry in 1929 had greater opportunities for

employment, but the industry as a whole was not in a position to give employment to those men who were dependent upon it for their existence since in many cases mines are isolated and people live around the mines, and there is no opportunity for other employment for them. The result is that the men stay there in the hope that the mine may reopen, and a mine may open up and work for two or three weeks, and then shut down again. Men do not move like they do in the case of other industries because there is no opportunity for them to do so. The result was that those men were still associated with the industry and were looking to it for employment, and the opportunities for employment were not sufficient. That decrease in opportunities for employment causes the men to be less well off, less happy, and more miserable. It is my personal opinion that the various (1373) industries of the country should be responsible for that labor force which they require in order to produce. Unless a mine shuts down and goes out of business, that mine is dependent upon that labor supply for its production in [fol. 631] event it gets an order and that is a cost of operation in my personal opinion which should be borne by the industry.

As to whether the bicycle industry should have provided for its employees when it was declining: When a firm engaged in the bicycle business actually went out of business, I do not feel that necessarily it should have been perpetually responsible for the workers that it could no longer employ. But in the coal industry it was not a case of mines going out of business entirely, of shutting down or rather of tearing down a tipple, or closing down a tipple for good. It was a question of the men still staying there, ready to operate, and operating at intervals as orders came to those specific mines. I think there is a great distinction between a bicycle plant going out of business entirely, and a mine staying in existence on the theory that if orders come through they will operate for one or more days, that if there were a lack of orders there would be no work for the men. (1374) Being a great advocate and a firm believer in unemployment insurance, I should say that business should bear the cost of maintaining unemployed workmen. Unless there is somebody there to protect the rights of the individual workers—and the only organization of that sort we have created thus far, outside of the legal or governmental insti-

tutions such as we had under the NRA (1375)—unless there is some organization of the only type I know of, which is the collective bargaining unit, to represent the worker and see [fol. 632] that his rights are granted, and that he is given definite protection, the individual worker is at the mercy of the employer. He has no alternative other than to leave, and in the bituminous coal industry, due to the fact that there is no other industry there, he would have to leave the community. In view of the fact that the coal miner has a particular type of skill which is of little value in most other industries, the opportunities for employment where he could make use of his skill in other industries is relatively limited. I believe that there should be laws enacted to protect a man so far as his rights are concerned, so that in event he wants to stay where he is even though he does not naturally get employment there, he can stay under conditions which are at least such as makes it possible for him to maintain a decent existence. (1376) I would insist upon his being provided with some form of protection whereby he cannot be taken advantage of by his employer.

With respect to the example I previously testified to of the United Mine Workers of America keeping miners at work in Kentucky in 1922 while there was a strike in competing fields, so far as the effect of that being to give that Kentucky field a share of the market which had previously been occupied by the field in which the strike was taking place—(1377) there were two situations involved. First, it enabled those Kentucky mines to fill such orders as they normally would have received, and second, in so far as it [fol. 633] made it possible to get additional orders it did affect the situation in other fields. I cannot say whether it did enable the Kentucky mines to get additional orders. That was the opinion of the individual miners. (1378) In my opinion there probably was some coal diverted from one producing field to another as a result of that situation. (1379) From the point of view of union economics, the welfare of its own workers, I would say it was not sound for the union to insist on that continuance of a supply of coal by the Kentucky miner. But from the fact that there was a legal factor involved, I would say it was. I cannot distinguish between sound economics and the economics of miners, between the economics of the miners' position and the economics of producers' position. They are all inter-

twined. (1380) Of course, it was to the advantage of the consuming public that the union insisted that those mines continue operating.

If as a result of a situation where the non-union fields supplied coal when the union fields were on strike, the consumer was compelled to pay a much higher price for his product than was normally justifiable, I would say that it was not in the public interest. In most instances where there has been a strike and where the non-union operators have continued to produce and furnish coal to the market, there is usually an increase of their prices to a point far above what is justified, and in very few instances have they thought of increasing the wages to their men during the [fol. 634] period of the strike. There was no evidence of the cost of mining having gone up, and yet the prices of coal did go up, and the public was made to bear the burden. (1381) in the period from 1923 to 1933 when the nonunion fields actually took markets from union fields, in so far as that may have resulted in higher prices, it was unjustified in view of the stocks of coal above ground, and was not good economics from the point of view of the consumer. If during that period prices were continually declining, and if the consuming public was to be in a position where it could receive coal whereas otherwise there would not have been enough coal available from the point of view of the consuming public it would be sound economics. It would be bad for the miners and the operators and for the future of the industry itself.

In this situation, as I use the term, I define "chaos" as a situation where the average producer has no idea what the market situation is going to be, where he cannot plan for the future on his labor costs, because of the fact that people are cutting right and left, where he is compelled by reason of the competitive situation to produce coal below cost, (1382) and, in general where he cannot plan even from day to day for his company's operations, because he never knows what the cost and the price situations are going to be, plus the fact that no profits are available for the large majority of the people engaged in the industry. "Cutting [fol. 635] wages right and left" would consist of one operator cutting his wages, cutting his costs, cutting his prices, thereby forcing another operator, either to the left or to the right, to do likewise, which in turn means that either the

first operator or the third operator, in order to maintain his share of the market, is compelled to cut his price, which means that he is compelled to cut his costs, and inasmuch as primarily his costs mean labor costs, that means cutting the wages of labor. That is not necessarily the common experience of all manufacturing mining industries. It is normally the usual thing when prices are declining (1383) in large portions of certain industries. In other industries, where labor costs, taking manufacturing as a whole, do not run in excess of about 80%, there is not the necessity to cut wages when prices fall. There are other factors that come into the pieture first, and that can be checked. But in the case of coal mining the biggest item of cost is wages, and therefore it is much more important and necessary for the employer to cut his wage costs if he is going to cut his outside costs. From the point of view of the individual worker who is out of work and is in need it does not matter what percent of total costs the labor cost of his former employer was. (1384) In so far as cutting wages leads to a future situation where there is interference with shipments it makes a difference from the point of view of the consumer.

I do not disagree with Mr. Tyron's testimony that there [fol. 636] are about 2,000 years of coal left, conservatively speaking. It was not the fear that coal resources would come to an end that prompted my prior testimony. My concern is with a situation which is so unstable that workers find themselves in a position where they feel they cannot continue to put up with conditions that prevail in the industry. That means that the public is constantly threatened, due to such dissatisfaction, with a situation where prices will go up because of the fact that men refuse to work and there are tie-ups in interstate shipments of coal. (1385) I am looking at it from the point of view of the long run of the consuming public. In 1923 in the bituminous coal fields the average number of men employed was 705,000, while in 1933 it was 418,000, a decline of approximately 40 per cent. I do not have the figures for the steel industry at my finger tips, but I would say as compared with 1923 the decline was not as much as in coal. I do not have the figures for copper mining at my finger tips. I really do not know whether it was as much as in coal. (1386) When I testified previously that coal mining was worse off than any other industries, I was taking industry as a whole. I compared coal with

manufacturing in general. I do not say that the employer should guarantee minimum conditions for the workman who wants to stay in his community, but the employer should guarantee such conditions to those workers the employer [fol. 637] wants to stay, and whom he expects to employ. The average coal operator, even when he does not get any orders, still expects to maintain his labor supply more or less in adequate form, so that when an order does come in he can operate his mine. That is one of the conditions of employment, and I feel that he should make some provision for it.

(1387) The Government has in fact, through the Social Security Act, said to the employers of this country: You must make provision for those workers you do not at times need but in point of time expect to employ. We do need to go to the present Act, despite the Social Security Act, for the coal industry. The Act provides that while a person is working he is given very definite protection in regard to wages, hours, and working conditions, in that it affords him a certain type of machinery known as collective bargaining, whereby he can have his chosen representatives to protect him in his negotiations with his employer, and also during the period of work to see to it that the rules and regulations, or the terms of the agreement, are maintained. The Wagner Labor Disputes Act does not provide the same thing. I would say that the use to the industry of this statute (1388) are the advantages of stabilization that experience has shown come in any industry in which there is collective bargaining.

There are other aspects of the Act which also provide benefits to the industry, for instance, the fixing of average [fol. 638] minimum prices. I previously testified that the device of fixing average minimum prices which I think is of tremendous advantage to the industry but which I think is an entirely independent factor, would be a good thing, but that there still will be the desire on the part of the employer to make as much profit as he can. (1389) I should not say that all employers in the coal industry are beneficent men in their attitude towards labor. There will probably be some individual operators who will feel that their men are entitled to higher wages if they get higher prices. Judging by the experience of the industry their neighbors will not necessarily increase their wage rates. When an

operator to the right or the left cuts his wages, the operator in between does or does not, depending upon what relationship he has with his workers, and whether they are organized or not, for the most part. If somebody cuts wages and thereby cuts his price, the man at his left in order to meet that situation must also cut his price, due to the fact that wages are an important factor in costs. He usually finds it impossible (1400) to operate and break even unless he does. He having done that, the man at his right finds himself in a similar position, and you thereby get the vicious circle, where the thing moves along throughout the trade, and operators find it impossible to maintain the mines in operation or to renew agreements when they expire. Collective bargaining, putting everybody on the same plane, prevents that vicious circle.

I do not say that the only stabilizing factor in this stat- [fol. 639] ute is collective bargaining. I say there are other alternatives in the bill which are helpful, for instance, the fixing of average minimum prices. (1401) Once you do have a minimum average price fixed, the pressure to cut wages, automatically is eliminated in large part. The man to the right or to the left does not have to cut his wages because of the fact that the price is already fixed, and the employer does not have to resort to the practices of his competitor. There certainly are operators in the coal industry in my judgment who will cut their wages if and when enabled to do so, even though they do not have to. When they do so cut their wages, assuming that prices have been fixed, their neighbors will not necessarily cut their wages because they know what the price situation is going to be and they do not have to meet the competition of the other employer who has cut his wages, at a lower price. They are all charging the minimum average price for the area. The minimum price will not necessarily be the price. (1402) In all probability over long periods of time it will tend to reach that point, the average for the area.

[fol. 640] Under a system whereby you have average prices fixed, the majority of the operators will continue to pay higher wages than they would have to pay if they can continue to make a profit under those conditions. (1403) This is so even though some competitor by cutting wages is able to make a larger profit. How long that will last will

depend entirely upon the type of individual in the industry, and how far they are desirous of increasing their profits at the expense of the wage rate. The fixing of average minimum prices would not cure at all the evils that were investigated by the Congress in respect of the years 1920 and 1922, when, according to Mr. Tryon's testimony, spot prices went way up off the top of his chart, to something in the neighborhood of $20 a ton.

1403-1404) Q. Now, the other day Mr. Lewin asked you would it be necessary for any element of the cost to be controlled in order to bring about benefits to the industry from the price-fixing device, and your answer was, on page 1234 of the stenographic transcript, "Absolutely, and it would be the wage factor." Have you changed your mind about that?

A. Well, I do not remember having said that, * * *. I feel that there are both factors, and have always so felt, as I attempted to state in the early part of my testimony, that you have two alternative ways.

Q. I will first read the question that was propounded to you, and then your answer:

"Q. Would it be necessary for any element of the cost to be controlled in order to bring about benefit to the industry from the price-fixing device?

"A. Absolutely, and it would be the wage factor."

What have you to say?

A. That contradicts what I said in the preceding pages, and if I said that it would be through inadvertence. As I said in the early part of my testimony, in answer to Mr. Lewin's question to me on that point, there are two alternative ways of getting better prices, and one is more important or at least more effective than the other.

(1405) The benefit that will flow to the industry from fixing minimum prices will take the form of larger profits to the producer, greater stability and greater likelihood of employment, plus more regular shipments to the market, and all those other factors that go with stable prices. When I refer to irregular shipments I mean those irregularities that result from tie-ups that have occurred in the industry, for instance, the strike of 1927—difficulties that arise in specific fields because of the inability to get any adjust-

[fol. 641] ment in regard to wages and hours, irregularities that result from one area being compelled to shut down because of the fact that it cannot meet the competition of another area. (1406) The Bureau of Mines Report for 1927 said that no consumer had to go without coal as a result of that strike and that was not erroneous, in my judgment. Consumers might temporarily have to pay a higher price, and the effect might be to shift the quality of the coal. For example, if coal is not available from a certain area where it has certain specific qualities that are necessary, we will say, for coke making, or the making of steel, or domestic heating, it would be necessary to shift to different types of coal, which means a difference in costs, and sometimes actual readjustment of burning equipment. It means a shift in terms of freight because it is necessary to go to a different market where the freight rate is different. All those factors cause irregularity and instability. Whether a consumer will go back to the kind of coal he originally used after having had to take a different kind due to a temporary strike situation depends entirely upon the relative difference in dollar cost to him for the coal, plus the difference in cost in terms of the efficiency in thermal units that he gets out of it. In 1927 in some instances consumers went back to the kinds of coal they originally wanted, but in other instances they did not. For instance, you find [fol. 642] that shipments from certain areas in the south continued relatively large, although there was later an increase in shipments from the northern fields. (1407) The fact that some consumers stayed with the southern coals after 1927 would indicate to me, as an economist, that those consumers were satisfied with the southern coals under the price structure then prevailing. So long as the southern operators were willing to sell coal at a relative differential as against other coals, a large number of the consumers continued to purchase their coals. Consumers always prefer to buy coal at lower prices, (1408) assuming its thermal units, the quality of the coal, and its adaptability to the work to be done, are equal. That does not mean that the main benefit to the industry of which I was speaking will be a benefit to the producer rather than to the consumer.

As to whether consumers prefer to buy coal from mines that are periodically on strike or from mines that are seldom on strike, judging by the experience of the central

competitive field, I feel that the consumers in those areas that use certain qualities of coal produced in those areas, over any relatively short period of time, will continue to buy from those mines in those areas that can meet the requirements at the lowest possible relative cost, taking into consideration service, deliveries and quality of product.

Whether there will be a tendency on the part of the men [fol. 643] to strike or to accept the reduction, in case an employer reduces wages, depends on how much he reduces them, and under what conditions. (1409) It was the experience of the coal industry that as a result of reductions in wages there tended to cause strikes, because of the fact that the competitor who cannot cut his costs and thereby meet the price situation finds himself in a situation where he cannot meet the competition of the operator who has cut his costs and thereby his prices. If there were price fixing provisions in the statute, without wage fixing provisions, there would still be some non-beneficent operators who would cut wages. There will not necessarily, therefore, still be periodic strikes because of the fact that the competitors of that individual need not cut their wages to meet the competitive situation, because an average minimum price has already been fixed. If wages are cut by one mine but not by a neighboring mine, that will not necessarily tend to cause the employee who has been cut to strike. There is case after case, even within the same plant, where different men get different pay for doing more or less similar work, and there are no strikes. Differences in pay always existed, even in unionized organizations. (1410) Shipments will not necessarily be decreased as a result of wage cuts by one competitor, wages staying up at the mine of the other. I base that answer on the fact that the experience of the [fol. 644] industry has shown that even in unionized areas there are different wage rates for similar work, due to different peculiar conditions that prevail in different mines, and in different areas. Those differences are the result of collective bargaining. In what I have been saying I have assumed that there was a minimum average price.

(1411) The minimum average price based on cost, being the actual price likely to be received, will not necessarily result in a profit to all the operators. I doubt whether it will. The percentage of the tonnage which can make money on that basis will vary from district to district, depending

upon the extent of the differential between the high cost and low cost mines. There is no information available which will make it possible to say what percentage of the industry will be able to make money in the case of minimum average price based on cost, unless you have the actual cost factors for all the mines in a given area. I have taken into account that there are variations from mine to mine in actual cost, but just what the difference is will depend upon what the cost sheets show for each mine. (1412) When average minimum prices are fixed according to the device which I think will be beneficial, they will not provide a profit to all members of the industry. I should say that it would make provision, perhaps, on the basis of statistical probability, using a spread from one end to the other, for 75%, 80% or 85% of the industry. It will vary from district to district. (1413) The price would vary from field to [fol. 645] field and from mine to mine, depending upon difference in conditions, in quality of coal, thickness of seam, amount of dead work, water, gas, and everything else. (1414) All those things enter into cost and you would have to take them into consideration when you fix the average price for the group. For individual mines I would take into consideration the cost of the tonnage for the mine and every other mine in the same area, and would fix my average on the basis of the average for the group as a whole. If the average cost in a given field is lower than the average cost in another field, one of the fields would sell its coal for less than the average price for the other field, using costs as a basis for determination. (1415) If you used a weighted average I doubt if any fields would receive revenues less than their cost, under that device. It would provide a weighted average cost, or more, to each of the fields as a whole in the industry. I cannot state a price in dollars and cents, unless I know what the costs are in each specific mine in a given field, and then I could give you the price only for that field. The price would be not less than the average costs for each field as a whole. As "fields" I would take the present set-up in the industry, such as northern Illinois, southern Illinois, Hocking Valley, eastern Pennsylvania, the Smokeless region of West Virginia and the high-volatile area. (1416) If the cost figures on Defend- [fol. 646] ants' Exhibit 37-A, prepared by the NRA, cover all the mines in the Michigan area, I would use the average

total cost for Michigan shown as $3.18 as the minimum price for Michigan. I do not know whether the figures on the Exhibit cover all mines. (1417) In order to get complete figures I would go from mine to mine and collect the data. I would send accountants out to audit the books of the mines. I would send them to every operator—any mine that is operating at the moment, or any mine that has not gone out of business. I do not feel that costs for 60% of tonnage would be a sufficient basis for fixing minimum prices under a system that provided that only the mines that voluntarily wanted to give costs would have to give them. Knowing the mining industry as I do, and knowing the relatively small percentage of output that comes from the relatively small and insignificant mines, I would want the cost figures from perhaps over 90% of the tonnage of the industry.

(1418) The economists, in talking about the competitive system, justify it on the ground that it makes it possible for the individual who is most efficient, in terms of the type of product he gives to the consumer, and the relative cost of the product, to get the business and make the profits. The competitive system is a system of individual enterprise whereby individuals are permitted to enter into in- [fol. 647] dustries and use their ingenuity and capital in the production of goods for market. In industries in which it is found as a fact that the reward does not necessarily go to the efficient, I do not think individual enterprise should be forbidden, but I feel that we should fix the plan of competition so that they will all have to abide by the same rules of the game. (1419) "We" is the economists.

[fol. 648] (1247) JOSEPHINE ROCHE, a witness called on behalf of defendants, after being first duly sworn, testified as follows:

Direct examination.

By Mr. Lewin:

I am at present Assistant Secretary of the Treasury of the United States. In 1927 I became the largest individual stockholder of the Rocky Mountain Fuel Company of Colo-

rado, the company which ranks second in Colorado coal production. I did not obtain control of the company until the following spring, 1928. From 1927 until last December, when I came to Washington, I had been constantly engaged as a bituminous coal operator. In 1927 I became a director of the Rocky Mountain Fuel Company and the following spring I continued as a director and became vice-president. I later became president and general manager, in which capacity I continued until last December. During the period the NRA Code was in effect I was, for the larger part of that period, a member of the Code Authority of Subdivision L, and was also vice-president of the Northern Colorado Coal Producers' Association.

(1248) I graduated from Vassar and took graduate work in economics at Columbia University, and engaged for some three years in New York City, after 1909, in industrial investigations while I was working for my doctor's degree. I worked with the Public Education Association in New York City in the investigation of working and living conditions [fol. 649] in various sections of the State. I worked in Colorado as chief probation officer of the Denver Juvenile Court, and was also for a year or a year and a half, early in 1912, secretary of a state group in Colorado which had as its object the studying of industrial and social conditions in the various agricultural, mining, and industrial sections of that State, and reporting to various groups about them. I hold an A. B. and an M. A. that I have earned. In January of 1915 I became an agent for the Commission for Relief in Belgium, and held that position for about six or seven months, and during that period I was for three months in the London office, and then for the balance of the time in this country working for the Belgium Relief Fund. (1249) I was probation officer, chief probation officer, and later referee of the Denver Juvenile Court.

During the latter part of 1912 and through 1913 and the most of 1914 I was closely in touch, through the public welfare group I have mentioned, with the study of conditions in the bituminous coal industry in different parts of Colorado. I knew personally men and women in different sections of the industrial portions of that State. During 1914 and the early part of 1915 I worked very closely with a group of investigators who were working with a United States Congressional Committee sent out there by the Con-

[fol. 650] gress to investigate the causes of industrial unrest and strikes in Colorado. The strike of 1913-14 had culminated in the Ludlow massacre, and the Congress sent out a special committee to investigate it. It held hearings in different sections of Colorado, and I worked very closely with some of the counsel and investigators who were looking into the causes and reporting them to the Congressional Committee. I worked in very much the same capacity with the special experts and investigators under the United States Commission on Industrial Relations, and when this Commission held later hearings in New York City, following the hearings they had held for some weeks in Colorado, I took on to New York witnesses that were to appear and did appear before the Commission, three women (1250) from the Ludlow massacre whose children had been killed in that event. The United States Industrial Relations Commission was appointed by President Wilson. Its scope was not limited to mines, or even to industry. It included the agricultural and industrial and various business conditions. I was at that time officially engaged in my work with the Juvenile Court in Denver until January of 1915, when I started work for the Belgium Relief Commission.

In Colorado from 1913-14 up to 1927 the coal industry was entirely non-union. In 1913-14 we had in the State of Colorado one of the periodic strikes which had characterized our industry for nearly 40 years, and in this particu-
[fol. 651] lar controversy, starting in the latter part of September of 1913, and continuing until the following November, there was very tragic waste of life and of property. (1251) In September, 1913, after months of effort to negotiate with coal operators of Colorado on eight requests, the United Mine Workers of America went on strike. Those eight requests had to do with improving working conditions, with a wage increase, but mostly with the right of the workers as citizens to have the laws of the State of Colorado enforced and their civil rights as citizens of counties recognized. For a long time in two large mountain counties in the south particularly, the men had been denied the rights of the Colorado statutes, such as the right to their own checkweighman, the right not to be blacklisted, the right to be paid in money instead of company scrip, the right not to be discriminated against because they were union men or seeking union organization. When the strike

was called the miners immediately left the coal camps in which they had been living and went into tent colonies on grounds which they had leased. (1251) I should state before I go into the strike further that in addition to the above, requirements as to living conditions in the sense of having to live in company houses, of having to trade at company stores, and having to purchase only at company stores through the use of company scrip were very general in those counties. Following the calling of the strike, the coal operators (1252) began to bring in strikebreakers, some from Colorado and others from other states.

(1267) [There was offered and received in evidence as plaintiff's Exhibit No. 66 a set of papers entitled "Statis-[fol. 652] tics of strikes, suspensions, and lockouts of bituminous coal mines in the United States, 1899 to 1933".]

(1268) The number of men who went on strike in 1913-14 represented approximately 75 to 80% of the entire number of miners in the State. The number of miners and our tonnage in Colorado are very small in comparison with the eastern fields and the central competitive fields, but relatively to the States of Nebraska, Kansas, South Dakota and other nearby states, which Colorado has served with coal supplies, they are of very great importance. During the year that followed the calling of the strike, the people of Colorado were put to added expense by having to import coal from other states. Much of our Kansas and Nebraska market was lost because of the interrupted supply of coal in the Colorado mines, and in addition the public was put to a very heavy expense by the indebtedness that the State incurred in keeping the militia in the field. In 1927 I made inquiries and learned that there were still outstanding bonds in the amount of over $1,000,000 indebtedness incurred for keeping the militia in the field at that time. (1269) There is still over $564,000 of this indebtedness. The loss to the operators was also very great, in that they lost markets. Closed mines mean inevitably a waste of coal, and there were very large direct financial expenditures by operators in fighting the union and its demands. I found, for example, from the records of our own company, [fol. 653] that during that period we had paid into a joint fund nearly half a million dollars for importing detectives from West Virginia; importing strikebreakers and gun-

men; arming guards; munitions; electrifying barbed wire around the closed mines and the building of an armored car. (1270) The purchasers of coal, not only in these counties, but in Denver and elsewhere, were put to great inconvenience and additional cost by the interruption of their normal coal supply.

The union was completely wiped out following the 1913-14 strike. The controversy became so acute that, following the Ludlow incident, after a week or ten days of very serious violence throughout the mining counties, the Governor of the State, at the request of large groups of citizens, called upon the President for Federal troops, and such troops were sent to the State and were there for some months. (1271) The operators always acted collectively to oppose the miners' demands.

(1272) At the end of 1915 I was out of the State for a part of the time, so I cannot testify personally to the 1917 occurrences or the 1922 occurrences. When I became connected with our company in 1927, a careful checkback through those years for price conditions and marketing conditions and labor relations showed that we had gone through a period of demoralized markets and very unsatis- [fol. 654] factory labor conditions, of tremendously heavy turnover in our mines, and of great resentment cropping out from time to time in our different mining properties between mine management and men, that the public, each time there was a cessation of coal mining in the State, found it necessary to pay higher prices (1273) for coal that was brought in from neighboring states, particularly Wyoming, and occasionally Utah. In 1927 labor was very dissatisfied with conditions in our company, particularly that we were still paying in scrip instead of cash, that the men did not have a checkweighman, except one at one of our mines who was an industrial spy, that the company employed industrial spies and maintained the head of a former detective agency. (1275) Our company was typical of the industry (1279) in Colorado. (1280) I found, by a check of our records, that the men had been very definitely shortweighted on their coal. I also found that trading at the company's store and living in company houses were requisities of employment, and that men and women buying at the company's stores were paying considerably higher prices than they would have paid at stores in nearby vil-

lages. These and similar conditions, which I believe to be typical of the industry of the State, were among the causes for the 1927 strike. (1281) Practically 80% of the mine workers of the State, entirely unorganized, went out on spontaneous strike in the fall of 1927, which lasted until early in 1928.

[fol. 655] In 1927 I found that there was very little freedom in the camps. The camps were guarded. Only persons who were known were permitted to go in. There were no free meetings or free discussion. The housing conditions were not satisfactory. The first time I went to our largest mine I was challenged by the armed guard and denied admittance until he was persuaded who I was. There were detective agencies employed. We had agents in our various mines who reported frequently on conversations they overheard among miners and told the superintendents and pit bosses the men they considered dangerous characters, that is, anyone who talked unionism. The company kept a file of these reports.

(1282) In 1928 our company adopted the policy of recognizing collective bargaining (1283) and we signed a contract in the summer with the United Mine Workers of America. The contract not only set forth the usual provisions of collective bargaining, but recognized that there is a public interest involved in the mining and marketing of coal, and pledged the parties not only to work for more satisfactory and efficient relations in the industry, but to assure consumers of coal a supply at reasonable and uniform prices, and to enlist public confidence and support by safeguarding the public interest.

(1284) [A copy of agreement between Rocky Mountain Fuel Company and United Mine Workers of America was [fol. 656] marked Defendants' Exhibit No. 39 for identification.]

All of our contracts have had the same preamble in them. There have been variations in the wage scales. The contract is substantially the same as the entire northern field has made under the NRA Code (1285). [The agreement previously marked Defendants' Exhibit No. 39 for identification was offered and received in evidence.] (1286) The special provision in the contract was that we agreed to pay, on the basic day scale, a rate 25 cents a day above that

of our non-union competitors, that should wages be cut in the mines producing the majority of the tonnage in the districts in which we operated, our scale would likewise be reduced, but that we would always maintain a differential of 25 cents on the basic day scale. This agreement was reached in the belief of both parties that we could justify that differential under union conditions (1287) through increased efficiency and cooperative relationships. We found a very definite gain, both for management and for miners. The production per man per day in our mines increased the first year of the union contract .7 of a ton over what it had been the year before. The following year there was a further increase of half a ton. The increase in our payrolls, which was approximately $75,000 in the first year of the contract, was substantially met because of the increase in production and continuing decrease in operating cost as a result of increased unit production and various improve-
[fol. 657] ments in relationship and in management. The condition of the company was improved and the earnings of the men were substantially increased. There was very general public support of this policy. The 1927-1928 strike in Colorado had subjected the citizens to much increase in the price of their coal, and the importation of coal from Wyoming, (1288) and there was a feeling of restlessness over the fact that these industrial conditions were constantly recurring at great cost and inconvenience to the public, so that we had in the operation of our contract, the very definite support of domestic buyers of coal. Despite the fact that markets were falling and the production of coal in Colorado had decreased in the three or four years prior to 1928 and 1929, one million or more tons, and has continued to decline, and our own production had also decreased, our decrease was not nearly as great as that of the other mines in the State. We attribute that to a very considerable extent to the interest that was shown in this contract.

Following 1927 the competitive situation in Colorado was very acute—constant price wars, reduction of prices, both domestic and industrial, and great uncertainty as to markets as a result. The Nebraska and Kansas markets were, to a very great extent, lost to our northern fields and to the southern field, because of competition from Oklahoma and Arkansas, and that in turn intensified the compe-
[fol. 658] tition in the markets of the State and in western

Nebraska. The price-cut situation was just about as acute as it could be and survive. (1289) During this period our company had considerable loss. I have heard other operators state that their condition was similar.

Our company was represented at the first meeting of operators who were mining under union contract in Washington in June, 1933, in the initial meeting that discussed the formation of what later became the NRA Bituminous Coal Code, and we took part in all the meetings thereafter. We presented our form of contract to the persons who were discussing the formation of the Code and it was discussed at those meetings. The result of the NRA Code was distinctly beneficial in Colorado, in that it eliminated many of the unfair trade practices, the rebates, the price discriminations, the excessive cuts in prices of coal, and (1290) it brought the entire industry, with the exception of some eight or teh percent, under union contracts. The northern field, where most of our properties operate, came under the same contract as that under which we had been operating. Since the Code ended last May, our field and the southern field have had very extensive and recurring price cuts. The price war became so intense in northern Colorado that for a period of time in August the mine price on two and a half inch lump in certain districts was down 95 cents below what it had been in May, and it is still considerably below. There is extreme competition and price-cutting at the present moment. Fortunately the wage contract is still in exist-[fol. 659] ence, which is the one stabilizing force now existing in the industry in our State.

I believe the stabilization of prices necessary and desirable in the interest of the industry, the public, and the workers. (1291) Unless there is some form of price stabilization which adequately protects the three groups, the inevitable temptation in meeting competition is on the part of the operators to cut their chief item of cost, which is labor, making up about 65% of the cost of the industry. There is a recurrence of the vicious circle of strikes, restricted supply of coal, interference in shipment of coal, the public paying higher prices during these periods, and industries demoralized and sometimes driven into bankruptcy. Price stabilization, it seems to me, would be very definitely in the interests of the public, because what the public objects to chiefly is not a small, regular increase in

the amount of its fuel bill, but the irregular and high peak prices it sometimes has to pay during the strike periods. The laying of a level beyond which, in the interests of all concerned, prices should not go, would remove one of the chief economic causes for these industrial outbreaks, with consequent public disaster. (1292) The closing down of mines in strike periods, or in any period, very frequently results in loss of coal reserves. There is nothing in mines more damaging than having the mine closed. That in itself wastes coal.

[fol. 660] (1293) Cross-examination.

By Mr. Whitney:

We sell coal to railroads. We delivered that coal to the railroads at the mine. None of our competitors in the northern field in Colorado sell coal to railroads. I understand the mine operators in the southern field sell to railroads. There are a number of railroads that run through the southern field and pick up their coal there.

(1294) I would say substantially that the following facts, given in defendants' Exhibit No. 13 are the case: That Colorado, in 1929, produced 10,000,000 tons of coal, that approximately 2,250,000 tons were delivered to railroads, that approximately 2,000,000 tons were sold interstate, and that all the rest of the 10,000,000 tons were sold inside the State.

I testified that due to our liberal policy in 1928 we had no further strikes at my company's mines. [Mr. Whitney pointed out that there were no strikes whatsoever in Colorado in 1929, 1930, 1931 and 1932.] No other operators during those years had our policy.

(1296) [There were offered and received in evidence the following: Defendants' Exhibit No. 17—Table entitled "Bituminous coal loaded for rail shipment on origin rail-
[fol. 661] roads in the Appalachian district north of Alabama—northern railroads"; Defendants' Exhibit No. 18—Table entitled "Bituminous coal loaded for rail shipment on origin railroads in the Appalachian district north of Alabama—southern railroads"; Defendants' Exhibit No. 19—Table entitled "Recapitulation of bituminous coal loaded for rail shipment on northern and on southern railroads in the Appalachian district north of Alabama".]

[fol. 662] (1297) DR. HOMER MORRIS, called as a witness on behalf of the defendants, after being duly sworn, testified as follows:

(1345) Direct examination.

By Mr. Lewin:

(1346) I am a graduate of Erlham College, Richmond, Indiana, with graduate work in economics and political science at Columbia University, for which I received a doctor's degree. I was head of the Department of Economics at Erlham College and taught in the Department from 1918 to 1928. In 1921 and 1922 I was director of child relief under the American Friends Service Committee in Berlin, Germany. In 1922 I was Director of Fuel and Director of Famine Relief in Bulgaria and in Russia under the auspices of the same Committee. In 1923 I was sent as Special Commissioner to investigate health conditions among children in the Ruhr. From 1930 to 1934 I was Professor of Economics at Fisk University. In 1931, when President Hoover asked the American Friends Service Committee to undertake a program of child feeding in the bituminous coal area, I was asked by the Committee to become the field director, which I was during 1931 and 1932. I was also connected with the work during 1932 and 1933.

We conducted a child feeding program in Pennsylvania, West Virginia, Kentucky, Maryland, Tennessee, and Illinois. We had a school feeding program, which was conducted in some 640 schools scattered through 40 counties in [fol. 663] those six states. (1347) I myself visited and studied in Pennsylvania, Clearfield, Cambria, West Moreland, Fayette and Washington Counties. In Tennessee I visited and studied Cumberland and Campbell Counties mainly. In Illinois I visited and studied Franklin, Williamson, and Saline Counties. In Clearfield I visited some 15 to 18 camps; in Fayette County some 20 to 25 camps; in Franklin County, Illinois, probably 15 to 20; in Williamson about the same number; in Cumberland County, Tennessee, 6 or 7. As part of the work investigating the necessity for the child feeding program I investigated the housing situation and the living conditions quite extensively. (1348) As a result of the study I published a book dealing primarily with the situation in Kentucky and West Virginia, entitled

"The Plight of the Bituminous Coal Miner," published by the University of Pennsylvania Press in 1934.

We visited a great many of the camps and in some of them we found it was not necessary to undertake a program of child feeding. In others we did find that it was necessary to undertake such program. But that varies. Which group was in the majority depends on its locality. I should say that in a great many counties there are both good and bad conditions, and in the better conditions we did not find it necessary to undertake the program of child feeding. In [fol. 664] the poorer camps where housing conditions were worse, where employment was less regular, it was necessary to undertake the program. (1349) I have spent probably two or three weeks at various times in Clearfield County, Pennsylvania, and about the same time in Fayette County and Westmoreland County in that State. I have spent probably three or four weeks in Cumberland County, Tennessee, at various times in the last three or four years and about one or two weeks in the counties in Illinois. I spent longer periods in the counties in West Virginia and Kentucky.

In Clearfield County, in the main, housing conditions are rather poor. They are all frame houses. (1350) Most are built on piles or posts without solid foundations. They have usually three or four rooms, not painted, and no facilities inside for water or sanitation. They have usually one well for every three or four or five houses, requiring that they carry water some distance. These houses show the result of lack of repairs during the past few years, so a great many of them were in a very bad condition. In a great many houses the plaster had fallen off at various places and broken through. Some of them leaked. Very often the porches sagged, the foundations had rotted out and had not been repaired. In general, the houses were in a bad state of repair. Usually the buildings were not weatherproof, that is, a great many of these houses have not been repaired in recent years, which meant that very [fol. 665] often the weatherstripping was off or loose, so that it was not at all resistent to the vigorous winters of that section of Pennsylvania. (1351) The heating facilities were stoves only. Miners' families are notoriously large, the average size being about five, and very often there are relatives who live with the families, so that in a house of four rooms it is not at all unusual to find rather large

families of eight and nine and then in addition one or two roomers. That is not in all cases, but I would say that that is not at all exceptional.

In the main, the general topography of that country is not level, but very hilly, so that in the main the houses were on the hillsides. Some of the camps were strung along the main highway, which was paved. The other streets were not paved and there were very seldom any sidewalks. Where there was enough level land, there were usually gardens, but usually there was not enough level land to provide gardens. (1352) There were very seldom lawns or patches of grass around the houses. There would result erosion and the washing of deep gullies, which would make lawns almost impossible. There were no facilities for sewage disposal, the sewage being thrown out into the back yard usually. Very often the atmosphere of a coal camp in Clearfield County is polluted by the burning of the slag pile. The coal catches on fire and burns continuously, sometimes for years. When that is connected with morning or night fog there is a general pollution of the whole atmosphere, making living conditions very difficult. Whether [fol. 666] there were any odors from the disposal of the sewage would usually depend on how close the houses were together.

(1353) The miners' houses in Clearfield County were in the main rather poorly equipped with a very small amount of very crude furniture. I was in very few homes where there was any carpet on the floor, for instance, in that section. Generally there were a few chairs, and some of them had shown the evidence of prosperity at one time, but had shown the inability to replace or repair furniture, so in the main the furniture was in a very poor state of repair. In the kitchen there was no provision for running water or sewage disposal; just a bare table, no sink. There were 3 or 4 iron beds, depending on the size of the family.

There was a very great shortage of clothing, showing the results of low earning power over a number of years. In a great many places we found where the children could not go to school because of the lack of clothing, and the women (1354) were not at all prepared with clothing for the cold winters. The condition of clothing that actually did exist was usually rather cheap. The clothing worn was very

seldon in good order or good repair. That varied in different families, depending on the length of time the miner had been employed or the wages he received. Some of them had shoes and a great many did not have adequate shoes to wear in winter weather. I am not sure whether I would say that was true of the majority. I would say in a [fol. 667] great many cases that was true.

In the examination of the children in that section we found that more than one-third were not getting the proper food in order to maintain their health. About one-third of the children in the camps where we fed were provided with a supplementary meal, and these children were provided the meals only upon the basis of an examination either by a doctor or by a nurse. (1355) The diet mainly was beans and pork and corn bread. That varied somewhat, but it was a very restricted diet because of the low wages and the unemployment that existed during that period. There were very seldom fresh vegetables and milk because they did not have gardens; vegetables were expensive; there were few cows in the camps, and milk was expensive. In a great many of the schools where we served milk the children would say that they had never tasted milk before. The children and the adults gave evidence of the effect of this diet, the children especially. There was undernourishment among the children and also bad teeth, which is an evidence of malnutrition. The general health of the children was an evidence of the lack of proper food and the inadequacy of food. In some of the schools those 10% and over underweight ran as high as 50%. The average was 32%. My investigation did not extend primarily to the adults. I was working primarily with the children. (1356) I cannot speak with statistical basis on the condition of the adults. There [fol. 668] were a great many people who were obviously undernourished and not getting the proper kinds of food.

Among the children especially colds were prevalant in the camps. Resistance was low, and it usually started with colds. It often developed into pneumonia and there were a great many cases of tuberculosis among the children. There were some cases of dysentery in the summer. Very seldom were there any recreational facilities in the camps. Some of the larger companies had company stores. A great many of the smaller companies did not. In the larger companies they usually had a fairly good variety of

merchandise in their stores. The smaller stores had usually a rather limited variety. (1357) I did not make any statistical study of the prices charged in those stores in Clearfield County, although I did in some of the counties in West Virginia and Kentucky. Those studies showed quite a bit higher prices in the company stores than in the private stores.

Usually the miners had very little cash. Where there was a company store there were certain debits before they were given any money at all, and during the period of 1931 and 1932 work was so slack that as a result they were in debt rather than having any cash balance, so they had very little cash. They had one or two days a week work, sometimes only one or two days a month. Work [fol. 669] was very slack; in fact, there were a great many miners in Clearfield County in 1931 and 1932 who had not had work for 1, 2 and 3 years. When they did work the wages were from $2 to $3 a day. These were subject to a deduction of house rent, probably a doctor's fee, smithing charges, and light charges.

(1358) In Fayette County there are larger companies where living conditions are very much better, where housing conditions were very much better, where the stores are better. You have a larger percentage of pretty good housing conditions in Fayette County than in Clearfield County. There are a number of camps in Fayette County which are just as bad as in Clearfield County, but the percentage is not as large. About the same thing is true in Westmoreland County as in Fayette County—a number of very good camps, and then camps that are very poor.

Conditions in Tennessee compare more favorably with Clearfield County than with Westmoreland or Fayette Counties—that is, smaller companies, poorer mining conditions, lower grades of coal, and a larger amount of unemployment. (1359) In Tennessee conditions are more nearly similar to the conditions in Clearfield. The typical diet in Tennessee is corn bread and sow-belly with beans and coffee. Housing conditions in Tennessee are very poor. The same thing is true about sanitation, sewage disposal and water supply.

In Illinois there is quite a different situation. Only [fol. 670] about 9% of the miners live in company towns. A great bulk live in independent towns. In West Virginia

about 80% live in company towns, while a very small percentage in Illinois do. The housing conditions in Illinois were very much better than the conditions I described in Clearfield County or in Tennessee. The houses are better furnished and better constructed. They are better houses in every way. Living conditions were very much better. (1360) The people in the typical camp in Illinois had a much greater variety of diet. The general topography of the country there is quite different from Clearfield County or from Tennessee or West Virginia or Kentucky. It is an agricultural country. Most of the houses have gardens attached. Most of the miners had gardens, so that they had a much greater variety of vegetables than was true of the other camps. They usually had milk. It was necessary to conduct a program of child feeding in Williamson and Franklin Counties. A great many mines were shut down while I was in Illinois.

In West Virginia I inspected mines in Monongalia County, in Marion County, in Logan and Mingo Counties, and to some extent in McDowell and Randolph Counties. In Kentucky I inspected mines in Bell, Harlan, Letcher, Perry and Knox Counties. (1361) In some of those counties there are very good camps—some of the larger companies. Some of the captive companies have very good [fol. 671] camps from the standpoint of housing conditions and living conditions; on the other hand there are a very great number of camps in those counties. One is impressed by going through that the poorer camps are in the majority. The poorer camps on the average are in about the same condition as the ones in Clearfield County, Pennsylvania, although probably the camps in Clearfield are a little more dilapidated than the majority of those in West Virginia and Kentucky, although there are a great many poor camps, especially in Perry and Letcher Counties and in Bell County, Kentucky.

The miners and their families had been having a very small amount of employment for the last two or three years—2 or 3 days a week—and then a very great many of them had been unemployed for long periods of time. They had not had enough food to properly care for the children or proper clothes for them. They did not see any hope for the industry or how they were going to make a living, or any opportunity to get a job anywhere

else. There was a general helplessness and a general despair and bewilderment about how they were going to get through the next winter. There was a general discouragement. At times they went to the position of desperation. (1362) When things got bad enough in 1931 there were occasions when they simply went to the company store and took food out of sheer desperation. That was before the period of Federal or State relief was at all well organized [fol. 672] in 1931 or in the fall of 1931 and early 1932.

I was in Kanawha County, West Virginia, just after a number of evictions had taken place. This was following the strike. During the fall of 1931 and the winter of 1932 there were a number of colonies scattered through Kanawha County—people who had been evicted as a result of the strike. There were four or five tent colonies right along the road and in one or two cases the tents were right adjacent to the concrete pavement.

As far as I know, the deductions from wages which were made in the typical mines of Kentucky and West Virginia as compared with the deductions made in the Pennsylvania counties were about the same. (1363) The larger camps usually had a camp doctor and varying facilities for hospitalization. The usual deduction for the doctor varied from a dollar to a dollar and a half. In the smaller camps they usually did not have adequate provision for hospitalization. There was a great deal of sickness in West Virginia and in Kentucky. In Kentucky and Tennessee the school facilities were very poor and very inadequate. In West Virginia they were probably a little better, although in the smaller camps they were also very poor and inadequate. In the larger camps there were better facilities for school. It varied a good deal with the size of the camps and the size of the communities. There were public schools. In [fol. 673] some cases public funds were supplemented by company funds for the extension of the schools. (1364) For instance, in Kentucky they provided seven months school. In some of the camps that was extended to 8 months, or eight and a half months by company funds. When the employees are all from one company, which is the chief taxpayer in the locality, the teacher naturally looks to the will of the operator to determine what he or she can or cannot do. For instance, in talking about school matters. we were practically always referred to the op-

erator. It was not the teacher who made the decision as to whether it was necessary to undertake a program of child feeding, as a matter of policy.

I was in Logan County, Pennsylvania, in early October, 1931, and the week before I was there, according to the report of the freight dispatching officer of the B. & O. Railroad, coal had sold for 15¢ a ton, and on that day, according to the reports on his desk, 1039 cars were unsold.

(1365) Cross-examination.

By Mr. Whitney:

From my experience in Logan County I did not understand that 15¢ a ton was the normal price for coal. That was no-bill coal that had been mined but had not been sold.

I did not visit any of the twelve mining counties in Alabama, or any of the seven counties in Arkansas, or the [fol. 674] two mining counties in California, or the twenty-two in Colorado, or the one each in Georgia and Idaho, which are listed according to the Department of the Interior. My experience was confined to six states. In Illinois I visited three of the fifty-four counties, those three being the largest producing counties, Franklin, Williamson, and Saline. (1366) I do not know whether the Department of the Interior report is in error in giving 27 mines in Franklin County and 48 in Fulton County, or in giving 61 in Saint Clair County. I would say, in connection with that, that we were guided in our investigation there by public authorities, who told us where the conditions were the worst in that State. We went to only those points where unemployment and undernourishment were greatest, according to the reports of the officials. In Pennsylvania we followed the same system. We went where conditions were the worst. The same is true in West Virginia, in Kentucky, and in Tennessee.

[fol. 675] Miss Mary Elizabeth Skinner, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lewin:

I am with the Children's Bureau, United States Department of Labor. I do field work in social research in the in-

dustrial field. I have been with the industrial division of the Children's Bureau for 15 years. In the spring of 1931 I went into the bituminous coal fields to make an investigation of living conditions, at the request of the President's Committee for Employment. I visited the coal fields in West Virginia, Kentucky, (1420) Alabama, Illinois, Indiana, Kansas, and Oklahoma. I made a detailed study of conditions, though, only in West Virginia and Kentucky. I visited about five counties altogether in both states and spent probably a week in each county. In West Virginia I was in Marion, Monongalia and Logan Counties, and in Kentucky I was in Perry, Hopkins and Union Counties. I made only very brief investigations in Hopkins and Union Counties. I was not there more than two or three days. In the three West Virginia Counties and Perry County, Kentucky, I was probably a week in each county, visiting the different mines.

I got my information from the miners and their families, from the mine officials in every community, from the school [fol. 676] officials, and any welfare officials or county officials that were there. I tried to interview everybody in the place who would have any information regarding the situation. (1421) I actually visited the camps and the houses and talked with everybody who could give me any information. Altogether I probably visited, in the four counties I mentioned in the two States, between 50 and 60 camps. I made every effort to get a rather complete picture of the actual living conditions in those camps. I think I did. I reported to Miss Grace Abbott, the head of the Children's Bureau, the result of that inquiry. As a result President Hoover gave the money that was left from the Belgian Relief Fund for child-feeding in the bituminous coal areas. (1422) In these various camps I visited, the wages of the laborers varied from $2 to $4.50 a day, on such days as they worked, and for the day workers they varied from $2 to $4.50. The day workers were often making more than the miners, because their work was more regular. A miner was averaging between eight and ten tons a day in most of the mines, where they could have earned a great deal more than that, had there been orders. The mines were not only taking care of all the men in the camp when they had an order, but they were taking care of some of the men from camps where the mines had been closed, and the families

were still living on because they had no place else to go. The weekly earnings, then, ranged, at the most, for the [fol. 677] loaders, around $10 to $12. The majority of the mines that I visited, at the time, were running only one, two, and occasionally three days a week. Very few of them were running as many as four or five days. These earnings, however, were not net earnings, because the miner has to pay for his explosives, and it was estimated by the mine officials and the miners I talked with, that this cost ranged from 60¢ to a dollar a day. (1423) A miner does not get all his earnings in cash, either. There are certain camp expenses not incident to the job, but incident to camp life, which are deducted. Rent is taken out and the expense of light. Most of the camps have electric light. In some camps there is a charge for coal, in some for insurance, and in some for a doctor, $2 for a family man and $1.50 for a single man. Rents average about $2 a room. There is an additional charge if there is running water in the house, or if there is a pantry in the house. Usually the miner's deductions that are taken out in normal times before he gets his pay will average anywhere from $8 a month up, according to the rent he is paying for his house. The miners when I was in the camps were living on scrip. They saw very little cash. Many men told me that they had seen hardly any cash within two years. The mine superintendents in many instances corroborated the statement.

(1424) The statements of the company stores and mine statements showed that it was not unusual for a man to [fol. 678] receive, at the end of his two weeks, 15¢, 20¢, 25¢ or 50¢ in cash. At the time I was there not all the deductions were being made. Their earnings did not warrant it. How much should be deducted and how much credit should be given was decided entirely by the purser at the store. The miners resented this very much. One miner had earned $23 in the two weeks ending March 31st. He had been allowed $15 in scrip on the company store, which had to cover all household expenses, and the remainder had been deducted to meet rent and the company doctor, and light charges. That is a typical instance of the way in which deductions are made. (1425) With regard to gross wages paid, that illustration would be high. That miner, at the end of the week, already had an overdraft from the store of the previous week of $16.56, and at the end of that week,

after paying his regular deductions, had retired his bill only to the amount of $2.

In a majority of the camps there was either a company store or an independent store that was authorized by the company to accept scrip, and that scrip was then deducted a certain percent when the store manager presented it for payment. The reports of the miners were unanimous that the company-store prices were high. I checked the prices of a company store with an independent store nearby, but off the company land, and one of the chain stores in Charleston, West Virginia, on the same items, and found that the company store prices ranged from 25% and more higher than the independent store nearby, and they were some-[fol. 679] times 100% and even more higher than the chain store in Charleston. In a majority of the company stores the merchandise was quite restricted, because the miners were not buying it, and they were not keeping it on their shelves. Some of the stores in the larger companies were well supplied, but the miners complained that they carried a brand of goods that was more expensive than they could afford to buy. They carried the best brands instead of the middle-grade or the poorer-grade brands. Very few of the company stores were offering fresh vegetables or fruits, because they had no demand for such produce.

(1427) The location of the camps with reference to other centers varied with the different counties. In Marion County the camps were not so isolated, on the whole. They were scattered over the county. In Monongalia County a large proportion of the camps are concentrated in one valley, about ten miles long, and in little hollows out from that valley. Some of them are not isolated in the summertime, not isolated in normal weather, but in bad weather they are inaccessible by automobile, many of them. I believe, when the American Friends Service Committee began serving meals, after they received the money from President Hoover, they put the miners to work repairing some of the roads into these camps so that they could get their supplies in. In Logan County the same thing is true, in many of the camps. Many of the camps are along the main high-[fol. 680] ways, paved roads, and others are up the hollow, and in the hollows off these hollows, that are inaccessible in bad weather. Some of the camps I visited were not such great distances from the towns. I cannot tell about them.

I have no evidence to prove that the miners are required (1428) to trade at the company stores.

(1429) By the Court:

I asked the miners if they were required to trade at the company store and the unanimous answer was that if they did not do so they were afraid that they might lose their job, or would not receive credit when they did not get work.

By Mr. Whitney:

(1430) In some instances the miners received credit when they did not have work. It was not extensive.

By Mr. Lewin:

The company camps are of all kinds. There are a few model camps, where the houses are substantial, and conditions are good. There are some camps where the houses are insubstantially built to start with, but they have been kept in good repair, but in the majority of the camps the houses are insubstantially built, out of just boards, perhaps with weatherstripping on them, and unplastered, and have not been kept in a good state of repair. The weatherstripping is off in many of them; there are cracks between the floors. The windows and the roofs are sagging, and it [fol. 681] is not unusual to go in a house and step around the pans that are there to hold the drip from the roof in bad weather. Many of them are on stiles, and the floor is thin, and it is difficult to keep them warm in cold weather. In the majority of instances there are no house facilities whatsoever, except electric light. Usually the electric light comes from the mine power, and most of the houses, no matter how poor they are, have electric light. There is no running water in the majority, and no bathrooms. In the majority of instances water is supplied from (1431) either pumps or waterworks in the camp—two or three houses to a pump, sometimes one or two pumps to an entire camp. In Scotts Run, in Monongalia County, the valley floor is very narrow, and the camps are on a hill, on one side, that rises very precipitously from the valley floor, and on the other side at a sharp angle also, and the camps on the tops of the hills have difficulty getting water in dry weather. They have to go to the valley and carry their water proba-

bly a quarter of a mile up the hill. Sometimes it is very difficult, considering the number of people using the pumps and the springs in the valley, for them to get enough water, and they suffer real hardship at times.

I would say in the majority of camps there is no sewage disposal of any kind. They just throw the sewage out in the camps.

There are very few grass plots or gardens in the majority of camps. In some there are cinder paths. In some [fol. 682] there are not even that. The houses are too close together to allow even a garden space, although, at the time I was in the community, every family was utilizing every little spot that was possible for a garden. In spite of the difficulties of the locations of the camps, they were putting in the seed that the Red Cross were furnishing them. The hills there rise very precipitously, and sometimes, almost at a 40-degree angle, so it is very difficult to farm that country.

(1432) I have no statistical figures as to how many persons were accommodated in the majority of the houses, but it was not uncommon to find eight or nine people in a three or four room house.

The diet was not only lacking in proper elements but many of the families were not having enough. There were no fresh vegetables or fruits, and very little milk. At the time I was in the camp I should say the majority of the families were existing on corn bread and beans for the larger part of the time, and many families had no other diet for weeks at a time, except corn bread and gravy made out of lard, flour, and water. The teachers in the schools had found it necessary, even when they had to dig down into their own pockets, from their meager salaries, even before I got into the communities, to do some feeding in the schools. Their funds were almost depleted at the time I was there, and they were very much worried about how they were going to keep the children going. (1433) The [fol. 683] teachers said that their attention was first called to the need of the children in the schools because the lunches were disappearing, and then they would frequently get reports from mothers, letters from mothers in the morning, asking them to send the children home from school, because they had had no breakfast that morning, and the father would be home from the mine with food before the day was

over. The men were going into the mines early in the morning without breakfast, and loading a car or two of coal, and then the children would get the scrip from the men and go to the store and get the food and have breakfast before they came to school. For that reason the schools were having a serious problem regarding tardiness, but were not trying to cope with it.

The clothing standards were pretty bad. The teachers had done a great deal to clothe the children, but they reported that there were a great many absences because of lack of clothing, and that the children were coming to school in a state of uncleanliness that was not usual, because they did not have enough clothing for the proper change. Quite often they would get an excuse that the child had to stay at home because the laundry work had to be done, so that they could attend the rest of the week.

(1434) These are just a few of the very many stories of the same kind that I heard.

Shoes are their greatest problem. Some of the children were going to school in the gum boots of their fathers that [fol. 684] were too leaky to be used in the mines, and I went into several schools where a large number of the children were wearing unmated shoes. Some of them were wearing galoshes in place of shoes. At the time I was there, there were no recreational opportunities. The children could play just around the mines and around the houses in the narrow valleys. In some of the larger camps there had been movies, and in a few the movies were still operating, and there was a Y. M. C. A. or something of that kind, but in the majority of the camps there were not any movies, and in other camps the movies were closed. Although the movies accepted scrip, they no longer could keep going. Most of the camps had primary schools, but it was sometimes hard for the children to get to the secondary schools if they were living in the more inaccessible camps. There is very little vocational training that I came in contact with. There is very little for the children to do as they grow up, except to go in the mine. (1435) At times there has been some housework for the girls, but at present even the mining officials' wives are doing their own work to a greater extent than ever before.

The school records and doctors' records are so meager that I could not give any statistical figures regarding the

health of the children. The teachers reported that many of the children in school had been underweight, and that was one reason for their starting feeding in these schools. In two schools in Logan County a very serious situation [fol. 685] arose when scurvy broke out, but the Rotary Club furnished the proper elements of diet that were given to the children in school, and that was controlled. There is a company doctor in every camp, but he is a general physician, and when the services of a specialist were needed, the people had to go without it, because they had no money either to get to neighboring cities or no money for physicians' services after they got there.

It is very hard to describe the state of discouragement and despair in which the miners work, especially in Logan and Perry Counties, Kentucky. In Monongalia and Marion Counties I would say that they are a little more hopeful, or, at least, they still had a little more of a feeling that perhaps there was some way out of the dilemma. (1438) There they had an opportunity, or tried at least to obtain collective bargaining, they were working collectively, and their spirits were better.

I was in Kanawha County at the time several of the miners were evicted from several camps in that territory after the strike. Those families were moved off the company land, and the only other land available was along the highway, along the main paved highway, which was traveled very frequently, so that their living conditions were rather uncomfortable. They were living in tents, and over a year after that when I returned they were still living in those tents. Most of them were being provided with food by the [fol. 686] county. A very meager allowance was being given. The county was not in a position to give much.

In picking out these 60 camps to visit, I did not select them with any particular idea in view to try to select the worst camps. I wanted as nearly representative a picture as possible, and I selected some camps that were the best, and those that were moderately good, and some of the poorest, in each county.

(1437) Cross-examination.

By Mr. Whitney:

I picked out the three counties from the 38 coal-producing counties in West Virginia after talking with the Secretary

of the President's Employment Committee, who had already made a tour of the States of West Virginia and Kentucky. He told me the reason for my going to those three was largely because they represented conditions in the different sections of the State. I picked two counties in the northern part of the State and one county in the southern part of the State, one county in the eastern Kentucky field, and two counties in the western field. The preponderance of counties, two in one section and one in the other, was because it happened to be convenient to go into those at the time, and they were representative mining counties. I base that on my visits to the other counties. I visited McDowell County in West Virginia. I should say conditions were not a great different in Logan and McDowell Counties. (1438) [fol. 687] They are both in the southern part of the State. At this time I spent about a week in Logan County. I am basing my testimony on other visits too. Following my investigation for the President's Employment Committee, I was loaned to the staff of the Department of Public Welfare of West Virginia, to help them set up their relief administration, in the summer of 1931, so that I was in and out of many of the coal counties of West Virginia during that summer, during which I was acting for the State. The State was seeking to alleviate this distress consequent upon the depression. At that time the Reconstruction Finance Corporation was giving money for relief to the States. (1439) I would say the prices in the company stores were high everywhere. I will have to quote the reports of the families to me when I asked them directly whether the company stores always had higher prices than the general stores. I did not mean to intimate that in some of the stores their prices were not higher. Usually the company stores were higher. I have had a long experience as a social worker. I would not say that people in a condition of dire poverty did not give me accurate statements. I did check the statements in some of these stores. In any investigation you would check the statements made to you. I would not say you had to check the statements of that group of people any more than any other. (1440) I mean people in comparable condition elsewhere. Anywhere I was making an investigation I would check statements made to me, in so [fol. 688] far as in my power, and I should say they should be checked. I worked for two years in Chicago, in family

relief work. I had had experience in seeing conditions of the same character as these conditions.

Redirect examination.

By Mr. Lewin:

I would say the conditions which I have outlined in the bituminous coal fields were as bad as any I had seen in other fields in the course of my social service work. I have been in the work twenty years and have been active.

(1441) Recross-examination.

By Mr. Whitney:

I would not say the conditions of the bituminous coal fields were worse than any I had seen in other fields. I would say they were as bad.

By the Court:

The general stores would not accept scrip. Only such stores as had been designated by the company could accept scrip.

By Mr. Whitney:

In the isolated communities there was one store in each community generally. If there was not a company store, one store in each community was designated by the company. I have no evidence that the operators had kept general stores out of the community. I would not be able to make the comparison as to whether city prices in ordi- [fol. 689] nary merchandise are lower or higher than prices in isolated rural communities. (1442) When I spoke of prices there I was comparing them with prices in independent stores and in stores in the towns nearby. I do not mean by that cities, necessarily. I mean towns the size of Fairmont. I particularly designated that the prices when I spoke about Charleston were from chain stores, which are necessarily lower. If a person lives within the vicinity of a chain store he has the advantage, of course. I did not visit conditions among the tenant farmers in West Virginia during the year 1931. I made no investigation of that at all except in so far as I came into contact with a tenant

farmer who were eking out his income by working in the mines. I have no information as to whether tenant farmers were making more or less than $8 or $9 a week. (1443) I was sent down there to investigate only the conditions in the coal mines.

[fol. 690] (1444) NELL SCOTT, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lewin:

I am a social worker in Pittsburgh, Pennsylvania, and have been engaged in social work 21 years, most of the time in and around Pittsburgh. There was a period of time for study out—away—from Pittsburgh, but all the time working in Allegheny County.

I began in the bituminous coal fields to do social work among the miners and their families resident in Allegheny County, Pennsylvania in 1928. When the 1927 strike was going on, a great deal of public attention was attracted to the situation among the miners, because once they had been evicted from the mining towns, the union built barracks (1445) for the most part along the highways, so that passersby noticed them, and then began a rather elaborate or extensive attack on nearby towns and farms for food. That was all written up in the New York Times. Two committees were formed, a committee of clergymen and business men. Fifty business men offered to put up a thousand dollars apiece for relief. Those two committees joined, and then I was asked to be loaned from my organization to be the field worker for that relief. For six months I did nothing else but that. As I remember it, there was no particular day [fol. 691] when the strike closed. It just petered out. Reports were brought back to the committee of the relief we were giving, and the organization with which I was connected was asked to take on county work, especially in the mining areas, so that from that day on I have been connected with mining areas.

(1445-1446) The housing conditions and things you observe from the outside have not changed materially in Alle-

gheny County among the miners from 1926 to the present day. There have been some other changes, but in housing and sewage disposal and things of that sort there has been none that I have observed. The houses are commonly known as blocks or patches, and are in the most common arrangement, very close together. In some camps there is not more than ten feet between the houses. They go in rows. I don't know of any camp where the roads between the houses are paved. In so far as they are on hillsides, erosion enters into them, and makes gardens difficult. When we tried to put on a campaign for having gardens, we couldn't get any. The Agricultural agent told us that the erosion had gone on underneath, and that the fumes from the burning culm banks made gardening difficult. Most mining camps are drab, dull and unhappy looking.

(1447) I do not know of any camp where provision is made for running water in the houses. A very few have pumps, but I do not know of any camp where there is a pump to every house. The highest number of families I have known to a [fol. 692] pump has been 15. In newer camps there is running water that goes along the street, so there is a hydrant for every so many houses. In some camps if the individual miner is enterprising or has initiative, there are some houses in which the miner has piped water to one faucet inside his house, but I don't know of any camp where that has been done by the company. Electric lighting is not universal. The older camps still have kerosene lamps. The heating, of course, is by coal. I suppose the most in numbers of rooms is four. I can't think of any of the houses that are in blocks having a cellar. They are built on stilts, sometimes with weatherboarding covering the stilts. Their state of repair in 1928 was bad for various reasons. That was following the strike. As I noticed them the last year, I should say there are not so many sagging porches as there were in 1928. In 1926 there had been the shift from miners, and the strike-breakers had moved in. I think that was one reason. They were on the whole less stable people than the miners themselves. That accounted for the houses themselves not looking so well. (1448) There were no inside toilets. In different camps there were different types of vaults or pits for the wash water, and things of that sort. The water just seeks its own level. It is thrown in a naturally formed gutter or gully.

The children play in the tracts in between the houses and out into the country or open spaces. The accessibility of [fol. 693] these camps to Pittsburgh or to smaller cities varies. Some mines are on the edge of the city and some far away. Allegheny County has 725 square miles, with the city in the center of it.

The life of the camp was free. I was permitted to enter and leave as I pleased.

I did not make any analysis of miners' earnings. (1449) It is commonplace that deductions are made. Rents are taken out as a matter of course, electric lights, where there is electricity, doctors' fees, carbide for lamps, depending on the occupation, there are smithing fees. Lately there has been a deduction for school taxes.

When we first went in we did not have any statistical scientific report on diet. The report was that it was inadequate, that bread and coffee always constituted the backbone of the diet. The test that the improved diet did do some good was that the school attendance did improve within a year from the time. The committee I represented was not the only source of relief. The union was putting in relief, and some individuals were putting in relief.

(1450) Prices were higher as a matter of actual check in the company stores than in the general stores. What worried the families most was the credit arrangements which were tied to the store. The miner could make no fresh start elsewhere, and even an independent store could not compete with the company store, because it could not give credit [fol. 694] on the same favorable terms. They had no hope or guaranty of collecting it. We noticed in trying to change the housekeeping arrangements of different families that the men were tied up and could not start from scratch. Fresh vegetables were few and milk was not commonplace, when we went in. I think milk is more commonplace now—at least the milk companies say so.

There were public schools, but in no camp that I can think of would there be a high school. High schools were available, but the cheapest cost of transportation I can think of would be 15¢ bus fare each way, and with the family having no cash at the end of pay periods very few of the miners' families that we know of went to high schools. (1451) There were no recreational opportunities provided in 1928. There

were two churches I can think of that tried to give recreational facilities after 1926.

We made no study of the degree of malnutrition. We had no doctors. School attendance improved after we went in. In a great many individual instances we found that medical facilities were not equal to the situation, and they meant the supplying of money to bring the people into hospitals in the bigger centers. Very few camps had a dentist except one part-time, so it meant a big program was needed for dental care.

[fol. 695] (1452) MALCOLM ROSS, called as a witness on behalf of defendants, testified as follows:

Direct examination.

By Mr. Lewin:

I am an assistant on the National Labor Relations Board and have been for a year. I am a graduate of Yale College, in 1919. For five years I was a newspaper reporter, most of the time on the New York Morning World. Since then I have been a writer of articles and books. I spent a year, 1931-1932—not in continuous residence—in the coal mining fields. I would go down for perhaps three or four or six weeks and return to New York for two or three weeks. From the fall of 1931 to the fall of 1932 I lived for long periods in Monongalia and Marion Counties, West Virginia—Kanawha and Mingo—and made frequent automobile excursions into other counties. I lived in Tennessee counties and in the tier of counties along the Tug River in Kentucky—Harlan, Bell, Letcher, Pike, Knox.

(1453) I was there as an observer for the American Friends Service Committee, of Philadelphia—the Quakers. I was required to observe everything that pertained to the Quakers' work. They were conducting a child-feeding project at the request of Mr. Hoover and of the Children's Bureau of the Department of Labor, and I lived with the Quaker field workers. I worked with them, distributing food and clothing, talking to the miners, operators, towns-[fol. 696] people, and anyone that I could find that had any information or opinion about the conditions. I was particularly interested in the impact of coal on the people

themselves. I had known the people along the Tug River through the reporting experiences I had had with the Louisville Courier-Journal some eight years before. I had taken long horseback rides through the country, and I think I had got to know the people very well. I was interested in the changes in the ways of living, habits, and so forth that coal brought into the country. I was first there about 1922. (1454) The counties I went through in 1922 were adjoining the coal counties. The people are quite homogeneous. The people of the hill countries are quite the same, and the comparison was with people in coal counties. Large numbers of the people came from the hill farms into mining and are of this generation. Harlan coal mining started in 1911, but it wasn't until some time later that coal mines came in on a large scale, so that the putting of concrete roads through the main arteries opened up the country as it never had been before in the last 20 years as a whole.

I wrote a series of articles for the New York Times that last year, and I later published a book, "Machine Age In The Hills."

The child-feeding project of the American Friends Service Committee started with $225,000, and more was later raised by private subscription. They eventually got into [fol. 697] 40 counties in six states and some 840 communities. (1455) I was engaged in the project. Weekly reports were made from every field worker to the central agency, and I received carbons of them. I think about 640 schools were covered.

My observation was that the wages in 1931 and 1932 in the counties I visited were not enough to allow practically any cash after deductions had been taken out. Referring to some notes I took at the time, this is one man's experience, and the wages in the district were $1.25 a day average. (1456) His monthly pay check was: Rent, $5; light $1.40; carbide, 50¢; doctor, $2; smithing, 40¢; burial fund, 50¢; powder, $1.50, which amounted to $11.30. Working eight days a month, he had a credit of $10, which put him into debt, and I should say that that debt was rather universal. But the companies in some cases did not charge for rent or lights, because there wasn't enough income to the miner to provide any credit for food whatsoever. I think the companies had a disposition, whenever they possibly could, not to charge for the rent. I have another slip here that shows

an income of $7.20 for the two-week period. Rent, $2.50; powder, $2; doctor, $1; coal, 75 cents; blacksmithing, 25¢; which came to $6.50, leaving him and his family 70¢ credit for food for that period. I can only say that I struck a great many instances of just this kind of wage statement. It seemed to be the normal thing for the miner's pay slip to balance the company's charges against his income and [fol. 698] allow him a very small and, in my opinion, inadequate amount for food credits.

I think there was evidence of a great deal of hunger. The Quaker investigation showed that one child in three all over West Virginia, for instance, was 10 per cent or more (1457) under weight for its height and age, which is the standard for under-nourishment. I cannot say as to whether there was any interruption in school attendance as a result of the lack of food. I daily entered mine shacks, and I cannot remember any real reserves of food in the house. There might have been a bag of corn if a man had a hillside plot to farm, and in the summertime they did raise a few vegetables in the plots immediately around the house, but outside of that there universally was no food supply in the house. I don't know any way to describe hunger by looking at people. I think their actions in these schools might show hunger. The children were ravenous, and over a period of time they gained very noticeably in weight on only this one meal a day supplied by the Quakers. The women of the camp were more than willing to come in to do the work of preparing this food and feeding the children. There were only two or three Quaker workers to a county, and they had to organize the local women. The evidence of the willingness to get into this, and the relief that there was from extra food coming in there, seemed to me an indication. (1458) I think, generally speaking, the mining people are in a very low state of health. At one [fol. 699] camp where I examined company's records, half the adults were chronically sick, and two out of five children. From general observation I think there is a good deal of rickets and tuberculosis among children, trachoma and pellagra, a dietary disease. Sow-belly and greens and corn bread is their traditional diet, and I think that the change in diet when they got into the mines—they ate out of tin cans when they could for a while, but at the time I was there they had no greens, and beans, bulldog gravy—

which is made of brown flour and water—and corn seemed to be the normal diet; but the mountain people do not know how to eat a proper diet, in the first place. It was the absence of enough food, I should say, under the conditions that I saw that was one of the troubles. Most county towns tried to raise funds to feed people and help them out locally, but I don't know of any instances where the relief could go beyond the needy people in the county seat itself, and I found that the people of the county towns really didn't know conditions in the fields outside their own town limits. I talked to many town people who seemed to think that things were much better in the field than they actually were.

(1459) The operators I talked to would very much have liked to have the wages increased. I think they were practically at a bottom, and it was my own observation that the operators themselves were in deep distress on many occa- [fol. 700] sions at having to pay such pittances to the miners. I do not think that wages could very well have gone below the point where they were then. They had reached the bottom of the cycle. Where a hard-pressed operator needed to cut wages or felt that he did, there were the devices of high prices at company stores, of rents—and the rents while they were small in comparison with what we consider as rents, were $2 a room and sometimes as low as $5 for a three-room house. That proportion compared to income was very high. When a miner was making $12 for a month, a $5 rent was a very large proportion of his income, and I didn't notice that the operators cut down the rents very often. Some wiped it out completely, because there was not enough income. (1460) I think the absence of check weighmen is another existing device which can mean that the miner is paid far less than he actually loads. There were check weighmen in northern West Virginia. They usually were absent in southern West Virginia and Kentucky. I think that was an irritation in the minds of miners continuously. In southern West Virginia and Kentucky the absence of any collective bargaining, any organization by which the miners could have a voice to object, would seem to me to allow these things to happen where otherwise they might not.

Most of the white labor in the mines is native to that region, some of it from down in Tennessee and Alabama, but

they are hill people. They are unhappy out of the hills and have strong traditions of staying where they are. They [fol. 701] very often come from small farms. They know that country. They are rather homeless and unhappy in other parts of the country, and I think that is a strong factor in keeping them there and keeping them in mining. (1461) There were some miners who went through Cincinnati and became charges on the relief of Ohio. The distance is not great from the Kentucky fields.

I can only say what was the financial condition of the typical coal companies from what the operators told me. For a very few, I examined the books, and they were bankrupt and in very bad financial condition. This distress was more prevalent among the little companies. There are a great number of small mining companies in that region. I should say that the conditions are much worse where the company is a small privately-owned one. They are adventurers who come into the market when coal prices are attractive, and they have no compunctions about shutting down when the prices are not favorable. I have observed a great number of abandoned camps, where the operator, feeling that coal was a hazardous industry, had built flimsy houses on the thesis that he would probably work the mine for a while and then go out. I think that is a great consideration in the bad housing conditions in the mines, except in the big companies where the seams of coal are thick and good. Operators consider their camps much as a lumber man would consider a logging camp and do not give much [fol. 702] more facilities for people to live in, but through habit people have come to live there, and no improvements have been made.

(1462) Other resources or means of employment open to the unemployed miners were rather scant. The farm land was out of their hands. It had been bought by the coal companies, and it was very difficult for them to find any other means of livelihood at all.

(1463) So far as the effect of the impact of the coal mining business upon the hill people, there are a great many of the people who had been farmers who had got into the mines and were exceedingly sorry that they had ever got into it. I believe a great majority wanted to go back to farming, (1464) and that there was great unhappiness among the older people who remembered the small-hollow

farm life, and that there was extreme unrest based on a desire to get back where they had come from—that is, the small-farm life before coal came there.

(1467) The report of the investigating committee appointed by Governor Lafoon, of Kentucky, to report to the Governor conditions in the southeastern Kentucky bituminous coal fields, dated June 7, 1935, was offered in evidence. It was stipulated that the report would be received in evidence but that it need not be copied as a formal exhibit and that the Court could take notice of it as printed in the House hearings on the Coal Conservation Act, June, 1935, at p. 636.

(1468) (The Court was asked by Mr. Critchlow to take judicial notice of the facts stated in the report of the United [fol. 703] States Department of Labor covering the welfare of the children in bituminous coal mining communities in West Virginia, being Bureau Publication No. 117.) (1469) (It was also stipulated that the Court may take judicial notice of the contents of the hearings and reports set out in the defendants' affirmative defense. Mr. Critchlow also invited the Court's attention to the fact stated in the report of the United States Coal Commission of 1923, Part III, pages 1411 to 1594, and pages 1609 to 1624).

[fol. 704] (1470) GEORGE H. ASHLEY, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examinatoion.

By Mr. Critchlow:

I am State Geologist of Pennsylvania, and Director of the Topographic and Geologic Survey of Pennsylvania. My duties are first, to act in a consulting capacity on all matters (1471) affecting the State Government, regarding its mineral resources or other matters in which geology enters. Second, the examination, mapping, and study of its mineral resources and reserves. Third, the making of a topographic map of the State and study of its underground waters and its geology and geologic history. We have made studies of the use and waste of mineral resources of the State. Leaving out of account earlier studies in New York, Arkansas and California, my work on coal began in 1896, as

assistant state geologist of Indiana, and I was put in charge of a survey of the coal fields of that state, the survey lasting three years. Again, in 1901, I did a survey of the Dagonia Springs region of southern Indiana for the United States Geological Survey. In 1902 I did a survey of the Cumberland Gap coal field for the United States Geological Survey. In 1903 I began work for that survey in Pennsylvania. In 1904, continuing that work, I was in immediate [fol. 705] charge, under Mr. Campbell, of all the United States Geological Survey's studies in the eastern coal fields, which continued to 1910. In 1904, in connection with conservation work which was taken up by the Federal Government, I was made a member of the Coal Board of the Land Classification Division of the United States Geological Survey, in connection with which, in 1909, I made a study of the economics of coal throughout the western public land states. (1472) From 1910 to 1912 I was State Geologist of Tennessee, during which time we made a preliminary study of the coal fields of that state. In 1912 I returned to Washington as Chairman of the Coal Board, and as Chief of the Section of Eastern Fuels, United States Geological Survey, and continued in that position until 1919, when I was appointed State Geologist of Pennsylvania. I have occupied that office continuously since that time.

I am familiar with the estimate of the United States Geological Survey showing 3,500,000,000,000 tons of coal of all grades in the United States. I was associated with Mr. Campbell and helped him in preparing some of those data. That estimate does not give a reasonably fair picture of the coal resources of the United States to the average man for the reason that it takes account of vast quantities of coal so thin or so broken up by partings of one kind or another as to be of no value under present conditions. It is about as though we were to include the gold in the ocean with the [fol. 706] gold resources, or the clay with the reserves of aluminum. Those figures were based on such figures as were then available, (1473) largely on measurements made in mines. Our later experience has led us to believe that they probably are somewhat exaggerated, for the reason that people only open mines where the coal has been demonstrated to be of workable thickness. That means that many areas where the coal has been exposed, but showed a small thickness, are simply passed over and forgotten, and our

belief now is that those figures, if revised with all the information we have today from core drillings, would be probably somewhat smaller. Confining my attention to coal of workable size and position, so that it could be extracted at reasonable cost under present conditions, and to the coal of a good quality, I would say with reference to the life of the coal reserves of that character that it would be 300 years, not applying to anthracite. Undoubtedly some of the good beds lie so deep that their mining would be deferred beyond the mining of other beds not so good, but more cheaply mined, near the surface.

Conservation to me does not mean locking things up. (1474) It means a wise use, the elimination of losses, and where possible, the substitution of a more abundant material for a less abundant material. I think it is possible that there could be a problem of conservation in a mineral where the total reserves are as much as they are in the case of bituminous coal. The reserves of coal we sometimes clas- [fol. 707] sify as available and non-available just as we might classify gold ores in the hills as available supplies and gold in the ocean as a non-available supply, from today's standards. In the same way the bulk of the coal described or figured in Mr. Campbell's estimate we would class today as non-available. We are trying today to conserve the coals that are available and that we can see being wasted needlessly. The fact that the resources seem to be so plentiful tends to encourage the waste of them. I would say that same thing is true in coal, as it has been in natural gas and oil in past times. People used natural gas for flambeaux. It was cheaper to let it stand running than it was to turn it off. From a business standpoint the cost is, I would say, the major item of conservation. For example, in Pennsylvania, when the mining (1475) of our mineral resources reaches a point where people can get the same product more cheaply from some other place, we might say that our resources, for the moment, are exhausted, and it means that business flows from our region to some other region. From the economic and business standpoints, we are not so much concerned with the final exhaustion as we are concerned with the exhaustion of those resources which we can get out at a cost that will keep us in the business of supplying them. The English engineers tell us that they have exhausted only about one-sixth of their coal supplies.

Notwithstanding that, they are mining coal at depths up to [fol. 708] 4,000 feet, and down to 8 inches in thickness. In our own country the anthracite mining today is mining coal at sometimes double the average depth of workings 50 years ago. The figures, in comparing 1877 to 1922, showed that the number of tons mined per man per day had been cut to just about half. As they go deeper the amount of water they have to lift keeps increasing, so that today there are about 12 tons of water lifted for every ton of coal lifted—in some of the mines as much as 18 tons. If this is expressed in terms of cost, you can see how the cost has been increased, except as that has been met partly by increased use of machinery. (1478) Conditions in this country in our eastern mining district, such as Pennsylvania, in the bituminous field, are becoming such that we might expect the same result here as in Great Britain, not as much, but to some extent already, as in anthracite.

(1477) The Big Vein district of Maryland is an excellent example of the rate at which the best bituminous coals are being exhausted. As I get the picture there today, there is very little virgin coal in that bed, which was a very fine bed of coal. Nearly all the workings are in pillars, or areas that had been left in previous mining. The Block coals of Indiana, which were in their day considered a very fine coal, are practically exhausted. The Sharon bed of Ohio, which in its day was considered a very fine coal, is, I think, [fol. 709] practically exhausted. The low-sulphur coal of Illinois, while in a thick bed, has a limited life. An examination of the Pocahontas region of Virginia and West Virginia will show a limited life. By that I mean that it has a life not measured in hundreds of years, but in scores of years. Pocahontas is part of the Smokeless field of southern West Virginia. It includes the Pocahontas and the New River beds, the two together, making the Smokeless area. If you confine your attention to the high-quality coals in the high-volatile beds of Kentucky and West Virginia, those are of very limited amount. There is a large body of lower-quality coals and of lower thicknesses, but again you are dealing with coals which a few score years at the outside will be exhausted.

(1478) Most minerals in Pennsylvania are in abundance, but our oil resources passed their peak of production in 1891. Natural gas passed its peak in 1906. Bitu-

minous coal possibly passed its peak in 1918, I think. It may come back, of course, to a new peak. There is no reason why it should not, physically, but, as I said before, some of the beds—for example, the Moshanon bed, in the Moshanon basin, is practically all gone. The workings on that bed today, outside that basin, are in split coal. That is, the bed, which was four and a half to five feet thick, in Moshanon basin, splits, going westward, and today the mining of that same good coal is in beds of 28, 30, or 32 inches. The same is true of many of the smaller basins, such as the [fol. 710] Barclay. There is no mining in it today. The Blossburg field is pretty well exhausted. The Antrim field and those little fields are all approaching exhaustion, so far as coal that can be worked commercially today is concerned. We have always said that Pennsylvania stands head and shoulders above any other states with reference to mineral production. In 1923 the value of mineral production in Pennsylvania was $1,226,000,000, or nearly one fourth that of the total for the United States. Personally I have been very much concerned with the question of conserving mineral resources in Pennsylvania (1479) for the reason that the coal is the main reason for our having our large iron and steel industry, which is also a billion-dollar or billion-and-a-half-dollar industry. If we cannot mine coal in competition with other States, a large part of that industry will move to other States. That is just one angle of it. The United States Geological Survey's estimate of the original reserves of bituminous coal in Pennsylvania is 112 billion tons. That included everything down to 12 inches, based upon the fact that these European countries were mining coal down to that thickness. About 10 or 12 years ago we made a very careful computation of the bituminous coal reserves of the State, which was supplemented later, in which we took account of only coals from 18 inches up, and in which we had access to a very much larger number of core drillings, all of which were taken account of. On that study we arrived at 75 billion for the total coal in [fol. 711] the ground, and 44 billion as probably recoverable, including the long future. That 44 billion tons at the 1929 rate of production would last just about 300 years. (1480) All of that coal is not of the same grade or value. As we go from east to west it changes in its percentage of volatile matter, the coals at the east being low-volatile

coals, those at the west being high-volatile, and those between being medium-volatile. The coals in the same region differ greatly in their percentage of ash, sulphur, phosphorus, and the fusion point of the ash.

Nearly all of the past mining has been in the best coals only. About 10 years ago we estimated 20 years as the expectation of the life of our Connellsville coking coal, but since this change in the situation with reference to by-product coking has relieved the drain on that basin, I would say that it will probably last now 20 or 30 years more. 10 years ago I figured the life of the Pittsburgh bed at 70 years, at the then rate of mining. That rate has declined. It possibly would go 100 years at the present rate. With an increasing rate following the decline of the oil and gas production, it is likely to come back nearer the 70 years. (1481) In 1905 I made a study of what we call the Punxsutawney quadrangle in central Pennsylvania, and in connection with that I made an estimate of the reserves. We [fol. 712] had there a very large amount of diamond-core drilling. Then I tabulated the coal according to thickness. That showed that 45 percent of the coal reserve was below two feet in thickness, 20% was between two and three feet, *or 65% below three* feet. *91% was below four feet, leaving* nine percent, of which only 2% was above five feet. That was the coal in the ground. Probably all of that five-foot coal has been mined out since that time, and probably very little, if any, of the four-foot coal still remains. I have not figured out those points, but, knowing that most of the mines that were mining the thicker coals have finished their work and closed their doors, that would be my guess.

(1482) In 1922 and 1923 we cooperated with the United States Bureau of Mines and the United States Coal Commission in the study of wastes in our state, and we published the report so far as it dealt with Pennsylvania. I have here photostatic copies taken from the report of the United States Coal Commission in 1925, Part III, which shows that for the United States as a whole the losses were 34.7 per cent, of which close to 20 per cent was classified as avoidable losses and about 15 per cent as unavoidable. The avoidable losses, with a normal 500 million ton production for the United States, would have meant 150 million tons. (1483) The percentage of recovery in European mines is up to 90% or better. (1484) Our studies in Pennsylvania indi-

cated a total loss of 27.1%, and of that about 15% was [fol. 713] avoidable, and 13% unavoidable. (1485) In 1929, when our production was 144 million tons, the avoidable loss amounted to 31 million tons. According to the statistics of the Bureau of Mines on consumption, it is more coal than the electric power utilities used that year. It is more coal than was used for making coke that year. It is more coal than was used by Italy and the Scandinavian countries that year. Some of those avoidable losses were due to the better coals, and even the Pittsburgh showed avoidable losses from 9% to 15%. The mining practices or methods which lead to these losses, include poor engineering, which leads to poor methods of laying off rooms; gouging pillars, so that the pillars fall before they are recovered, leaving coal for roof when the roof is bad, or sometimes for bottom, when the bottom is soft; failure to mine thinner benches above and below the main bench; failure to clear up and remine; (1486) or to re-enter areas which are shut off by squeezes; for the same reason, failure to re-enter regions that become flooded, in which the flooding would cost something to reduce; and the mining of a thicker bed below a thinner bed, which destroys the value of the thinner bed above, or at least destroys a part of its value. As an instance of the cap seam, the upper Freeport in the Clearfield district lies only 30 or 40 feet above the lower Freeport. The average Freeport is three or four feet in that district. The mining of the lower Freeport first has de- [fol. 714] stroyed a good deal of the value of the upper Freeport, and a good deal of it cannot be recovered. Then there is the leaving in the mines of pillars, particularly in regions where the original cost of the coal is low, and the leaving in of pillars where the margin of profit is low and they are getting the coal as cheaply as possible. Then, too, poor methods of mining which means a considerable waste —the small coal made in the mining by machines, coal wasted from the cars and not cleaned up, wasted in screening, wasted in loading and not recovered—small in the individual case but large in the aggregate. The figures given in the 1923 survey of the Bureau of Mines do not include coal wasted due to the premature abandonment of mines. (1488) When the mine is prematurely abandoned and in some mines it has no determined effect, but with most mines it seems that the constant effort of an operating mine to

keep its passages open, its roof in good order, and so on is lost, so that the roof falls and pillars of coal are apt to be squeezed. Roof falls may open passages to the surface, so that water enters. It is often true that companies re-entering a region partly mined will abandon that area and start in virgin coal. (1489) I cannot give anything definite about the amount of tons lost in the case of premature abandonment of mines generally throughout the country. In Clearfield County, which I am familiar with, where the number [fol. 715] of mines abandoned between 1921 and 1930 was a drop from 191 mines to 96. If half of those mines are recovered and the other half not recovered, you might estimate a good many million tons were lost in those mines and not recovered. I would say that in that single county several million tons, at least, would be lost through that cause. A study in 1929 found the condition somewhat similar—a slightly better condition in Pennsylvania than before. I am not familiar with the situation since that time. In the region that I know of I would say the wastes due to premature abandonment are largely connected with the financial condition of the industry. (1490) The fact that there were high prices in 1920, 1921 and 1922, and during the War caused the opening up of a lot of mines. To my mind it is the curse of the industry that when you have a run-away market and high prices which meant high profits such as you had during the War and in 1922, you have a number of mines opened up. When prices fall and there are no profits the mines close after they have stood it as long as they can. If there was a regulation of maximum prices to prevent the run-away markets, as we have had in the past, there would not be the tendency to open so many mines. There is practically no hope of making any progress in checking wastes in mining as long as the industry operates in a condition of financial depression, (1491) because men will not mine high-cost coal when they can barely meet their costs mining low-cost coal, and these wastes largely involve additional cost.

Under present conditions the State of Pennsylvania could [fol. 716] use its police powers to prevent wastes at mines, but it will not because it would drive the business out of the State. In my opinion the first necessary step to prevent this waste in mining I have referred to is stabilization of the industry. Perhaps I am thinking of what we call the

captive mines—that is, mines owned by the power companies or by the steel companies, which do not sell their coal—as stabilized mines. If we could get the whole industry stabilized in the same way, so that when a man opened a mine he had fair assurance of continuous operation until his property was exhausted, without periods of cutthroat competition, he could then afford to take such measures as would cut the losses to the minimum. I would say that the State of Pennsylvania cannot take any measures to prevent this cutthroat competition. I believe the stabiliziation of prices on the basis of fixing a minimum price would help to prevent the waste of coal in mining.

(1492) It would be an element in stabilizing the industry and, to that extent, would allow men to plan their workings so as to reduce losses, particularly with reference to using retreating methods rather than advancing methods. In retreating methods they mine from their point of entry to the boundaries in the way of entries and then recover the coal, retreating from the boundaries back to the point of entry. In the advancing method they take the coal as [fol. 717] they go.

(1493) Cross-examination.

By Mr. Whitney:

A private business habitually tries to recover the easiest and cheapest coal first in order to get a profit. It was not my experience that when prices were high in 1920 that practice of business men ceased and that they devoted their extra earnings to recovering the harder and more difficult measures instead of the easier and more available measures. They knew that the high prices would not last very long. When I spoke of thin seams and said that I excluded them in my estimate of 300 years of coal of good size and quality being left, I had in mind as being a thin seam a vein below 18 inches. In Europe today they do mine thin seams down to 18 inches in many places. (1494) Even down to 12 inches in some places. The coal under 18 inches undoubtedly will be mined 300 years from now. My estimate of 300 years includes the bituminous coal of the west as well as of the east. It is my belief as a geologist that there will be no more sources of energy "discovered" within the next 300 years, based upon the experience of

the last 300 years, if by "discoveries" is meant something that has not been tested. I believe that we have now tested all of sources of power that we know of. (1495) I would say that it would be foolish to say no to the question [fol. 718] whether I believe that man would know any more by the year 2035. I would probably not have said no to that in 1635 if I had been one of the few settlers in Virginia. When we are getting beyond 300 years, we are getting outside the realm of practical scientific prediction in the industry.

I am confident that a good many coal operators would devote an increase in prices for coal to increase of the wages of labor, and also to devote some of the funds would go to better methods, more conservative methods, of extraction. I would say that the methods of extraction have improved in the last twelve years. That has taken effect despite declining prices. There is a constant pressure felt in the industry to improve methods under the spur of competition. (1496) I wouldn't say that they cost more. Those methods, I would say too, have been mostly in areas of high initial cost of the coal, as in the Pittsburgh bed, where some of those coals cost two thousand to three thousand dollars an acre. The coal companies desire to get all the coal they have paid for that they can, and in many instances the better methods of working are not more costly.

With respect to my testimony that the mines in Clearfield County had been reduced from 191 to 96 during the period 1921 to 1930, I could not give it to you offhand—the approximate reduction in Allegheny County in the same period. I doubt if it would be of the same order. Pitts- [fol. 719] burgh is in the middle of Allegheny County. The mines such as those in Allegheny County would be close enough to their market to continue operations, whereas the Clearfield County coals which must go over Allegheny Mountain to get a market, and possibly back over the mountain to get to Pittsburgh, could not succeed. The chief market of those mines is today inside the State of Pennsylvania. (1497) It is because those mines had closed that the miners were out of work and their children suffering. It is my thought that if the prices go up probably some of those mines will be re-opened. The

reopening of mines would aid the conservation in that district by taking more coal out of the district. Coal would be conserved because coal would be recovered that would otherwise become irrecoverable by re-opening some of those mines. I mean by irrecoverable that in some instances it could not be recovered at anything like what we would class as reasonable prices. It could be recovered if you would count coal at many times its present price. (1498) You would simply have to make a new mine to recover that which has become abandoned. I think there were perhaps 20 coal mines working in Pennsylvania in 1820. Coal will not waste in the ground. It is nature's storage place if it is in sufficient body to pay for getting. A good deal of this in these abandoned mines in narrow pillars would involve an amount of dead work, as it is [fol. 720] called, to reach them and recover them. They could be recovered only under prices which would be many times the present prices. The crying evil of the industry is the irregularity or lack of stability, that is (1499) times of high prices when many mines open, followed by times of low prices when many mines close, some of which will result in a loss of coal but all of which results in an uncertainty that prevents a mine operater from planning and conducting his mine efficiently.

It has been the experience of Pennsylvania in some periods that when its prices go up it loses markets to other states. I would be inclined to say that prices went down in Pennsylvania from 1923 to 1930, although I am not sure. I don't have those figures in mind. I believe that prices going up would not likely go up so much in Pennsylvania as in other regions and therefore give Pennsylvania a better competitive position. Pennsylvania is near New York, New England, and other eastern markets.

(1500) Redirect examination.

By Mr. Critchlow:

When a mine is closed, shut down, and abandoned, you often have caves, roofs falling in, squeezes, and things of that sort. Every mine is a law unto itself. I have seen mines where it would be feasible to mine the coal after a squeeze or things of that sort; in other mines it certainly would not be under present conditions, or in the

near future. It is very much more expensive to go in and [fol. 721] clean up an area so that it can be mined rather than to mine under conditions where the work is continuing and the roof can be kept up while the work is going on. A cheaper method of mining would be one where you can get a certain tonnage for a less total cost. That normally involves increased waste, but you may devise a method which is both cheaper and less wasteful, as, for example, when they turn from wide rooms with narrow pillars to the plan of driving narrow rooms and recovering their pillars on retreat. Some less wasteful methods are cheaper methods and some are not. (1502) It is undoubtedly the profit which might be made out of the sale of the coal that has a bearing on the question of re-opening an abandoned mine, rather than the price at which coal is sold.

Recross-examination.

By Mr. Whitney:

By profit I mean the difference between total realization and total cost. In total cost I include all costs, including overhead, taxes and royalties. It is not my experience that operators close down their mines as soon as they cease to make a profit based on that type of cost although they are still making and taking in a net cash return.

[fol. 722] (1507) WILLIAM W. ADAMS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Critchlow:

I am in charge of the accident statistics work of the United States Bureau of Mines, and have been for about 15 years. Previous to that time I was assistant to the engineer in charge of the accident statistics section for 9 years. The mining of bituminous coal is an industry of high accident risk. I have statistics that show that the bituminous mining industry is sometimes the worst and usually nearer

the worst than other industries, so far as accident rate is concerned. (1508) [There were submitted and marked for identification the following: Defendants' Exhibit 40—table headed "Comparison of accident rates in bituminous coal mining with other industries, 1930,"; and Defendants' Exhibit 40-A—table headed "Comparison of accident rates in bituminous coal mining with other industries in 1934".]

I used 1934 figures in defendants' Exhibit 40-A because they were the latest figures available, and I used 1930 figures in defendants' Exhibit 40 as being representative of the last year that might be considered normal, covering a large volume of experience from an accident viewpoint. [fol. 723] Those portions of the two tables that relate to the mining and quarrying industries are compiled from reports received from the Bureau of Mines. The other portions are collected from the National Safety Council, (1509) which is a voluntary and non-profit organization engaged in accident prevention work on a national scale, and the membership of which is composed of employers in all lines of industry, who report their accident experience to the headquarters in Chicago. The Bureau of Mines collaborates with the National Safety Council in the compilation of accident statistics for mining and quarrying. The figures compiled by the National Safety Council have the full confidence of accident prevention engineers and accident statisticians as being a very reliable source of information. The data obtained by the National Safety Council do not cover all establishments in any given industry. They cover the accident experience of those companies that hold membership in the Council and report their accident experience to it. The figures for any class of members of the Council do not cover the entire industry. (1510) Generally speaking, the membership of the Council is made up of the larger and more progressive companies that take a particular interest in the prevention of accidents to their employees. The accident experience of the bituminous mining companies that report to the National Safety Council is very much better than the average accident rate of the bituminous mines [fol. 724] throughout the country. The table for 1930 (defendants' Exhibit 40) shows that the bituminous coal mining companies reporting to the Council had an accident frequency rate of 64 as compared with an average for the industry of 97.1. They had an accident severity rate of 12.6,

which is very much higher than the other industries listed by the Council, but unfortunately we have no accident severity rate for the bituminous industry as a whole. The figure of 97.1 as the frequency rate for the industry as a whole was based upon reports collected by the United States Bureau of Mines from all of the commercial mining companies in the United States, exclusive of the very small mines known as "country banks". (1511) The bituminous coal mining companies covered in the National Safety Council's returns had very much better records than did the industry as a whole. In these tables the frequency rate represents the number of accidents, both fatal and non-fatal for each million man-hours of employment during the period covered by the figures. By accidents I mean any accident that disables a miner for one day or more. The severity rate represents the number of days of disability per thousand man-hours of employment, and in computing the days lost from deaths and permanent total disabilities 6,000 days are used for each such accident, and for permanent partial disabilities a percentage of 6,000 days, depending upon degree of severity of the injury. These two rates, the frequency rate and the severity rate, are stand-[fol. 725] ard indicators of the accident hazard. They were adopted by industrial accident boards and commissions of the various states and the National Safety Council and other organizations interested in safety. (1512) For accidents of a fatal nature and of a more serious non-fatal nature, I should say the severity rate is the best indicator. In 1930 the frequency rate for bituminous mines was about 3½ times the general average for all industries and the severity rate was about 6 times the general average for all industries. Those proportions are only slightly altered for 1934, being about 5½ times the general average, on a frequency basis, and nearly 3 times the general average, on a severity basis. In the 1930 table the heading "Construction" represents the accident experience of large construction contractors engaged in the erection of steel buildings, or of large concrete constructors, such as the Boulder Dam; large plumbing contractors, large plastering contractors, large-scale construction operations in general. (1513) The high hazard involved in the construction industry is in persons falling and in material falling on persons. In the 1930 table there is included in the classification "Mining,

Underground Mines'' all operations underground in connection with the extraction of anthracite coal, bituminous coal, metal, and non-metallic minerals, and the hauling of [fol. 726] it to the surface.

(1514) In 1934 the bituminous coal mining industry still had the worst severity rate, but its accident frequency rate was third from the bottom, ranking slightly better than anthracite coal and lumbering among the separate industries shown on the table. The over-all rate referring to frequency for mining in general was slightly worse than the bituminous coal rate that year. In that year the severity rate for bituminous coal mining was about 2½ times that of lumbering. Lumbering in that year was an industry of a great number of small accidents but of fewer fatalities and serious accidents and disablements than bituminous coal mining. (1515) During the 10-year period from 1924 to 1933, 15,471 were killed by accidents in the bituminous coal mines in the United States. The chief cause is falls of rock and coal at the working face, and in the decade mentioned, 7,825 men were crushed to death by falling rock and coal. The next cause is transportation underground. In the decade, 2,751 men were run over by underground mine cars and locomotives or were squeezed between the sides of the cars and haulage ways, or were struck by overhead beams, and in other ways. The next principal cause is gas and dust explosions. 2,354 men were killed during the 10-year period either by suffocation from gases or by being thrown by explosion. (1516) That cause is being greatly reduced. In 1930 there was only one so-called major ex- [fol. 727] plosion, meaning by that one that causes five deaths. In earlier years there used to be a dozen or 15 or more. Moreover, those that have been occurring in more recent years involve a much smaller loss of life. (1517) Another cause is the item of accidental deaths caused by explosives—powder and dynamite, which catch men as the blast goes off, or in other ways while they are handling or using the explosives. 366 men were killed in the 10 years ending 1933 by that cause. 710 men lost their lives in the decade because of contact with electric current underground, chiefly contact with the trolley wires that are used in connection with the running of cars. (1518) Miscellaneous accidents underground were the cause of 576 deaths in

the 10-year period. This includes accidents due to machinery—mining machines, undercutting machines, loading machines, and general power machinery underground. There were 177 men killed by shaft accidents, most of them caused by the men falling down the shaft; some by objects falling down the shaft onto the men at the bottom. All accidents above ground caused a loss of 712 lives during the same 10-year period.

Statistically speaking, over a period of five years, and assuming a working life would cover a period of forty years, there would be about 1 chance in 10 of a man's [fol. 728] being killed. The experience for 1933 was about 1 in 12. A man is likely to be injured about once in every six years. By an injury I mean any injury that prevents a man from returning to his work on the following day.

(1519) As regards deaths from accidents in coal mines, there has been a very marked reduction in the past 10 years, and as regards non-fatal injuries, the rate extends back only to 1930, and during that period there has been a very gratifying reduction.

I have figures taken from an official report of the British Department of Mines showing how the accident rate in American coal mines compares with that in foreign countries. [There was offered in evidence as Defendants' Exhibit 41, a table entitled "Mean Actual Death Rate from Accident per Thousand Persons Employed at Coal Mines in the Principal Producing Countries for the Periods 1913-1922, 1923-1932, and 1933."] (1520) The source of the table is the official records of accidents of Great Britain, and the figures shown from the United States are based upon the records of the Bureau of Mines. The accident rates represent the number of men killed out of each thousand men employed within a year's time. The rate for the United States is much higher than that for the other countries. (1521) As shown by the table for 1933, the United States rate was 3.6 per thousand employees as against the British rate of 1, the German rate of 1.9, the French rate of .7, and [fol. 729] the Belgium rate of .1. (1526) [Defendants' Exhibits Nos. 40, 40-A, and 41, heretofore marked for identification, were received in evidence.]

(1527) Cross-examination.

By Mr. Whitney:

In the booklet entitled "Coal Mine Accidents in the United States, 1933," a publication of the United States Department of the Interior, Bureau of Mines, it is shown that the Department has adopted an index number as to fatality rates, comparing them year-by-year. In defendants' Exhibit No. 40 that index number is calculated upon the basis of the third column, that is to say, frequency rate per million man-hours. That index number for the year 1930 is given at 100.5, and on the basis of that the index number for 1934 is approximately 80. (1528) 1934 was the year of the Code. [Mr. Critchlow stipulated the accuracy of the figure in "Coal Mine Accidents in the United States, 1933" showing the index figure for 1933 to be 68.7, and Mr. Whitney called the Court's attention to the fact that conditions got much worse as to this factor after the Code went into effect.]

(1529) Redirect examination.

By Mr. Critchlow:

The table to which Mr. Whitney refers has reference to fatal accidents only. The table to which Mr. Whitney re-
[fol. 730] fers has reference to the frequency rate for fatal accidents only. The frequency rates on Exhibits 40 and 40-A has reference to all accidents, non-fatal as well as fatal. (1530) The index table to which Mr. Whitney referred is based upon the accident rates in the same publication, but on page 104 the base period representing 100 was the years covering 1906 to 1910. The fatal accident rate during that five-year period was considered to represent an index of 100. With that as a basis, the fatal accident index for 1933 was 68.7, representing an actual death rate of 1.476. Exhibit 40 covers fatal accidents and all non-fatal injuries involving disability for one day or more, and shows that in 1930 there were 97.10 accidents per million man hours of employment, and a corresponding rate of 79.34 for 1934. Those figures are not to be used in comparison with the tables in the bulletin to which Mr. Whitney referred, because they cover all accidents, whereas the bulletin figures cover fatal accidents only.

Recross-examination.

By Mr. Whitney:

In the 1933 booklet, table 66 covers fatalities. (1531) All accidents by years are not covered in this book. The figures for each year are in the book covering that year. [Mr. Whitney then called attention to the fact that the grand total according to the booklet entitled "Coal Mine [fol. 731] Accidents in the United States for 1930", for non-fatal injuries in bituminous coal mines is 79,217, and the grand total for the same in the 1933 booklet is 43,946, representing a percentage of just over 60%.]

(1532) Further redirect examination.

By Mr. Critchlow:

Those figures are not comparable. They are absolute figures, and represent two years when industrial conditions were quite different.

Further recross-examination.

By Mr. Whitney:

The figures are comparable from different points of view. The comparable figures on the frequency of accidents are given for 1930 on page 7 of the 1930 booklet, and for fatal accidents the frequency rate was 2.158, and for non-fatal accidents 94.937. Similar figures for 1933 are given in the bulletin for 1933, on page 9, and in that year the fatal-accident rate was 1.476 and the non-fatal injury rate was 77.86. Those figures are comparable for 1930 and 1933, because the number of accidents is related to the same number of man-hours of exposure to hazard.

[fol. 732] OFFERS IN EVIDENCE.

[Mr. Critchlow then offered and there was received in evidence a copy of the Coal Mines Act of 1930, Great Britain, as Defendants' Exhibit No. 42. (1550) There was also offered and received in evidence as Defendants' Exhibit No. 43 a copy of the report of the National Resources Board,

December 1, 1934, and as Defendants' Exhibits Nos. 43-A, 43-B and 43-C, excerpts from said report, namely: Section 1 of Part IV, pages 391 to 393, inclusive; paragraphs 1 and 2 of Title III of Section 2, pages 400 to 405; and Title XIII of Section 2, pages 435 to 437. (1552) There was offered and received in evidence as Defendants' Exhibit 45 a certified copy of an extract of minutes of meeting of the District Board of District No. 7 under the Bituminous Coal Conservation Act of 1935, held at Washington at 4 p. m., November 5, and an order of the National Bituminous Coal Commission, dated November 14, 1935. (1553) There were offered and received in evidence as Defendants' Exhibit 46 a table headed "Production of Bituminous Coal, 1920 to 1933, in Thousand Net Tons", a table giving tabulation of the average value per net ton f.o.b mine on code area basis, a table giving tabulation of men employed on the same code subdivision basis, a table giving tabulation of average day's work in the subdivisions during the period from 1923 to 1932, and a table showing output per man per day broken down on the same basis. There was offered and received in evidence as Defendants' Exhibit 30-A a chart entitled [fol. 733] "Index of Tons Loaded at Mines for Shipment, and Realization f.o.b. Mine, for Selected Competing States, 1923-1933", referred to at pages 1155 and 1166 of the record.]

[fol. 734] (1561) Stanley Anthony Willer, called as a witness on behalf of the plaintiff in rebuttal, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Whitney:

(1561-1565) [The following exhibits offered on behalf of the plaintiff were marked for identification:]

Plaintiff's Exhibit 68, chart entitled "Per Cent 1930 Production of Bituminous Coal is of 1913 Production—By States."

Plaintiff's Exhibit 68-A, statement entitled "Trend of Bituminous Coal Production, by States, 1913 and 1930, (net tons)."

Plaintiff's Exhibit 69, chart entitled "Percentage of Total Bituminous Production of United States in Each Specified State; 1807-1820, 1850, 1880, 1910 and 1934."

Plaintiff's Exhibit 69-A, statement entitled "Bituminous Coal Production by States in Specified Years."

Plaintiff's Exhibit 70, chart entitled "Index Numbers of Wholesale Prices."

Plaintiff's Exhibit 70-A, chart entitled "Index Numbers of Wholesale Prices."

Plaintiff's Exhibit 70-B, statement entitled "Index Numbers of Wholesale Prices of Specified Commodities of Commodity Groups."

Plaintiff's Exhibit 71, two charts entitled, respectively, "Retail Cost of Food, 1913—100" and "Retail Prices of Coal, 1913—100."

[fol. 735] Plaintiff's Exhibit 72, statement entitled "Deficit of Specified Industrial Groups, 1928-1932."

Plaintiff's Exhibit 72-A, statement entitled "Net Income or Deficit of Specified Industrial Groups, 1928-1932."

Plaintiff's Exhibit 72-B, statement entitled "List of Makes of Passenger Cars Made Commercially in the United States since the Beginning of the Automobile Industry, Showing Those Makes No Longer Being Made in First Nine Months of 1935."

Plaintiff's Exhibit 73, statement entitled "Average Hourly Wage Rates Paid Common Labor."

Plaintiff's Exhibit 73-A, chart entitled "Average Hourly Wage Rates Paid for Adult Male Common Labor in Important Industries Requiring Considerable Numbers of Common Laborers."

Plaintiff's Exhibit 74, statement entitled "Average Hourly Earnings in Cotton-Goods Manufacturing in New England and South Atlantic States, 1924-34, by Occupations."

Plaintiff's Exhibit 74-A, chart entitled "Average Hourly Earnings of Loom Fixers (males) in Cotton Goods Manufacturing in New England and South Atlantic States, 1924-1934."

Plaintiff's Exhibit 74-B, chart entitled "Average Hourly Earnings of Weavers (females) in Cotton-Goods Manufacturing in New England and South Atlantic States, 1924-1934."

Plaintiff's Exhibit 74-C, entitled "Table 2—Ratio of Average Hourly Earnings in New England to those in South Atlantic States, by Occupations."

Plaintiff's Exhibit 74-D, statement entitled "Wage Differential Between North and South in Bituminous Coal Mining and Cotton Textile Industries."

Plaintiff's Exhibit 74-E, chart entitled "Ratio of Average Hourly Earnings in North to those in South, Separately for Bituminous Coal Mining and Cotton Goods Manufacturing, 1918-1933."

Plaintiff's Exhibit 75, statement entitled "Number of Disputes in Specified Industries, 1919 to 1933."

Plaintiff's Exhibit 75-A, chart entitled "Number of Industrial Disputes in Specified Industries."

Plaintiff's Exhibit 76, statement entitled "Average Number of Days Worked and Days Idle, by Causes, in Bituminous Coal Industry, 1913-1933."

[fol. 736] Plaintiff's Exhibit 76-A, statement entitled "Percentage of Potential Working Time that Bituminous Coal Miners Worked and Were Idle, by Causes, Annual Average, 1924-1933."

Plaintiff's Exhibit 76-B, statement entitled "Average Number of Days Worked and Days Idle, by Causes, in Bituminous Coal Mining, 1924-1933."

Plaintiff's Exhibit 77, chart entitled "Average Number of Days Idle Per Man Employed, by Causes, 1924-1933, Bituminous Coal Mining."

Plaintiff's Exhibit 77-A, statement entitled "Per Cent Days Idle Each Year Due to Strikes Is of Total Days Idle in Bituminous Coal Mining, 1924-1933."

Plaintiff's Exhibit 78, chart entitled "Average Number of Days Idle on Account of Strike Per Year Per Man Employed in Bituminous Coal Mining in Specified States, 1924-1933."

Plaintiff's Exhibit 78-A, chart entitled "Average Number of Days Idle on Account of Strike Per Year Per Man Employed in Bituminous Coal Mining, 1924-1933."

Plaintiff's Exhibit 78-B, statement entitled "Average Number of Days Lost on Account of Strike Per Man Employed in Specified States, 1924-1933,—Bituminous Coal Mining."

Plaintiff's Exhibit 78-C, statement entitled "Total Number of Men Employed and Man-Days Idle on Account of

Strike in Bituminous Coal Mining, 1924-1933, With Separate Totals for Specified States."

Plaintiff's Exhibit 79, chart entitled "Per Cent of United States Total in Each Specified State of: Man-Days Idle on Account of Strike in Bituminous Coal Mining; Bituminous Coal Production, Ten-Year Period, 1924-1933, Inclusive."

Plaintiff's Exhibit 79-A, statement entitled "Man-Days Idle on Account of Strike, Suspension or Lockout and Bituminous Coal Production in Each Specified State, 1924-1933."

Plaintiff's Exhibit 79-B, chart entitled "Man-Days Lost on Account of Strike per 1,000 Net Tons of Bituminous Coal Produced, 1924-1933."

Plaintiff's Exhibit 79-C, statement entitled "Comparison, by Specified States or Groups of States of (1) Number of Man-Days Idle on Account of Strikes, Suspensions and Lockouts and (2) Bituminous Coal Production, 1924-1933."

[fol. 737] Plaintiff's Exhibit 80, statement entitled "Strikes, Suspensions, and Lockouts in Bituminous Coal Mining Industry, 1915-1933."

Plaintiff's Exhibit 80-A, statement entitled "Strikes, Suspensions and Lockouts in Coal Mines, by States, 1921-1933."

Plaintiff's Exhibit 81, chart entitled "26 States in which Bituminous Coal is Produced Commercially."

Plaintiff's Exhibit 81-A, statement entitled "Bituminous Coal Production, by States, 1933."

Plaintiff's Exhibit 81-B, chart entitled "Per Cent of Bituminous Coal Produced Within 4 States."

Plaintiff's Exhibit 81-C, chart entitled "5 States in which Anthracite or Semi-Anthracite Coal is Produced Commerically."

Plaintiff's Exhibit 81-D, Statement entitled "Production of Anthracite and Semi-Anthracite Coal by States, 1933."

Plaintiff's Exhibit 81-E, chart enttiled "Per Cent of Anthracite and Semi-Anthracite Coal Produced Within One State, 1933."

Plaintiff's Exhibit 81-F, chart entitled "10 States in Which Iron Ore is Produced Commercially."

Plaintiff's Exhibit 81-G, statement entitled "Iron Ore Mined in the United States in 1933, by States, in Gross Tons."

Plaintiff's Exhibit 81-H, chart entitled "Per Cent of Iron Ore Produced within 3 States."

Plaintiff's Exhibit 81-I, chart entitled "18 States in which Copper is Produced."

Plaintiff's Exhibit 81-J, statement entitled "Origin of Smelter Production by States, of Copper Produced in the United States from Domestic Ores, 1933."

Plaintiff's Exhibit 81-K, chart entitled "Per Cent of Copper Produced Within 4 States."

Plaintiff's Exhibit 81-L, chart entitled "13 States in which Salt is Produced Commerically."

Plaintiff's Exhibit 81-M, statement entitled "Salt Sold or Used by Producers in the United States, 1933, by States."

[fol. 738] Plaintiff's Exhibit 81-N, chart entitled "Per Cent of Salt Produced Within 4 States."

Plaintiff's Exhibit 81-O, chart entitled "5 States in which Oranges are Produced Commercially."

Plaintiff's Exhibit 81-P, statement entitled "Production of Oranges, by States, 1933-1934 Season."

Plaintiff's Exhibit 81-Q, chart entitled "Per Cent of Oranges Produced Within 2 States."

Plaintiff's Exhibit 81-R, chart entitled 216 States in which Motion Pictures are Produced."

Plaintiff's Exhibit 81-S, statement entitled "Cost of Production of Motion Pictures by States, 1933."

Plaintiff's Exhibit 81-T, statement entitled "Per Cent of Cost of Production of Motion Pictures Industry Accounted for by Establishments in Two states."

Plaintiff's Exhibit 81-U, chart entitled "23 States in Which Motor Vehicles (not including Motorcycles) are Produced."

Plaintiff's Exhibit 81-V, statement entitled "Value of Products of Motor Vehicles, Not Including Motorcycles, Industry, by States, 1933."

Plaintiff's Exhibit 81-W, chart entitled "Per Cent of Value of Products of Motor Vehicle Industry (Not Including Motorcycles or parts) Produced Within 4 States."

Plaintiff's Exhibit 81-X, statement entitled "Percentage of Total United States Production of Specified Commodities Produced Within Specified Number of States, 1933."

Plaintiff's Exhibit 82, chart entitled "Annual Earnings (Calculated) of Trackmen Employed in Bituminous Coal Mines in Selected States, 1922-1933."

Plaintiff's Exhibit 82-A, chart entitled "Annual Earnings (calculated) of Hand Loaders Employed in Bituminous Coal Mines in Selected States, 1922-1933."

Plaintiff's Exhibit 82-B, statement entitled "Average Number of Days Worked Per Year, Average Earnings Per Day and Calculated Earnings Per Year of Wage Earners in Specified Occupations, 1922-1933."

[fol. 739] (1566) During the last ten and a half years I have been in charge of the research and statistical work of the Ralph H. Jones Company of New York, Cincinnati, and Hartford. The five years previous I was with the Babson statistical organization. I am a graduate of Denison University, Granville, Ohio, with the degree of Bachelor of Philosophy. I have attended this trial and studied practically all of the exhibits submitted by both the plaintiff and the Government. For some weeks prior to the commencement of the trial I was engaged in studying the various Governmental reports on coal mining and allied industries.

[Plaintiff's exhibits previously marked for identification, Nos. 68, 68-A, 69, and 69-A were offered and received in evidence.]

(1567) On table 68 the year 1913 was selected because it is the pre-war year usually used for comparison by the Bureau of Mines and other organizations, and 1930 was selected as a recent year in which the production of bituminous coal was approximately equal to that of 1913. Plaintiff's Exhibit 68-A is a detailed table supporting the chart No. 68. The chart to the Plaintiff's Exhibit No. 69 starts with the years in which the earliest records of mining were kept and shows the situation at intervals up until 1934. The data charted are the percentage of the total [fol. 740] bituminous production in the United States in each specified state during these periods. In the period 1807 to 1820, the only bituminous coal produced in the United States of record was produced in the State of Maryland. Since that time Maryland's proportion of the total United States bituminous production has gradually and consistently decreased until, in 1934, only one half of one percent of the United States bituminous coal production was accounted for by Maryland. A similar situation is presented by Ohio. In 1850, Ohio accounted for more than 22% of the bituminous coal production in the United States,

the percentage gradually declining in the other years represented on the chart until in 1934 Ohio's percentage of the total was less than 6%. West Virginia presents a somewhat different situation. (1568) In 1815 there was no record of bituminous coal being produced in West Virginia. In 1880 West Virginia accounted for 4.3% of the total United States production. West Virginia's percentage increased to 14.8% in 1910 and to 27.3% in 1934, in which year it was the largest bituminous coal producing State in the Union. Over a period of 84 years the chart represents, from the point of view of the statistician, a rather consistent trend downward over the entire period for Ohio, and upward over the entire period for West Virginia.

[fol. 741] [Plaintiff's Exhibits 70, 70-A, and 70-B, previously marked for identification, were then offered and received in evidence.]

(1569) With respect to Exhibits 70, 70-A and 70-B, the index numbers of the wholesale prices were supplied by the Bureau of Labor Statistics of the United States Department of Labor. Included in the index number of wholesale prices of all commodities are a total of 784 commodities. Represented in the index number of raw materials are 109 raw materials. I think it is rather obvious from the chart that there has been much less fluctuation in the price of bituminous coal during the period represented than there has been in either all-commodities as a whole, or raw materials as a whole. It also may be seen that bituminous coal declined less in price during 1926 to 1930 than did the all-commodity index or the raw material index. The second chart (Exhibit 70-A) is similar to the first (Exhibit 70) except that it compares the wholesale price trend of bituminous coal with specific commodities and subgroups of commodities, whereas the first chart showed it for broad general groups. As we go from broad groups to specific commodities, we find that the fluctuations are far more violent. For instance, if we were to combine hides and skins with petroleum products we would find that the combined line, such as you get in a group of commodities, such as raw materials or all-commodities would show much [fol. 742] less fluctuation than do hides and skins alone, or petroleum products alone.

(1570) [There was offered and received in evidence Plaintiff's Exhibit No. 71, previously marked for identification.]

(1571) On this Exhibit (No. 71) we see that the retail prices of bituminous coal, as we have previously seen with respect to the wholesale prices, had less fluctuations in the period represented than the other commodities shown on the same chart. I think it is of interest to note that there is less decline in the price of bituminous coal during the period represented than there was in the stove and chestnut sizes of anthracite coal. As compared with 1913, bituminous coal prices in May, 1935, were 50% higher. Comparing that with the index of all-food prices, we find that all-food prices were about 25% higher in May, 1935, than they were in 1913, thus showing that bituminous coal has enjoyed a larger price increase over 1913 than has all-foods.

(1573) [Plaintiff's Exhibits 72, 72-A, and 72-B, previously marked for identification, were offered and received in evidence.]

Plaintiff's Exhibit No. 72 merely shows a number of other industries which suffered a deficit or loss in the five-year period beginning in 1928. This is not intended [fol. 743] to be a complete list of all industries or groups which had suffered a deficit, but it does show that there are a number of others besides bituminous coal which suffered a loss during that period. The source of the information in Plaintiff's Exhibit 72-B is the magazine Motor, which has from time to time published a list of the makes of passenger cars made commercially in the United States, and it is the usual custom to put a line through or some other similar mark, (1574) to indicate those makes of cars which are no longer being made, and to also indicate those makes of cars which are still being made. This has sometimes been called the automobile "roll call", and at other times "after the battle". Of about 570 or 575 makes of cars listed, there are 28 which are still being produced in the United States, during the first nine months of 1935. This is offered as an evidence that there has been a rather sizeable mortality in one other major or important industry.

This was the most illustrative evidence bearing on the mortality of other industries I was able to find. We were able to find evidence of considerable mortality in other lines of business. For instance in reference to retail business. Since the evidence did not cover the entire United States but merely certain sections, such as the State of Illinois, part of New York, and various other sections, it was decided not to present that because it did not cover the [fol. 744] United States.

(1575) [Plaintiff's Exhibits Nos. 73, 73-A, 74, 74-A, 74-B, 74-C, 74-D, and 74-E, previously marked for identification, were offered and received in evidence.]

The table numbered Exhibit 73 (showing the average hourly wage rates paid to adult male common labor in various industries in various sections of the country) is a copy of a table which appears on page 303 of the Statistical Abstract for 1934, and indicates the exact form in which the Bureau of Labor Statistics reports this information. From the table we have taken four sections of the country in which are found important coal producing states, and have charted the average hourly wage rates paid in those sections. The sections we have taken are the east-north-central states, in which the important coal producing States of Ohio, Indiana and Illinois are found; the middle-atlantic states, in which the important coal producing State of Pennsylvania is found; the south-atlantic states, in which the important coal producing States of Virginia and West Virginia are found; (1576) and the east-south-central states, in which the important coal producing States of Kentucky and Tennessee and Alabama are found. It will be seen that in the two northern geographic divisions, namely middle-atlantic and east-[fol. 745] north-central, the average hourly wage rate has been consistently and considerably higher than in the south-atlantic and in the east-south-central states. The proportion the two southern groups bear to the two northern groups is from 50 to 65%.

Plaintiff's Exhibit No. 74 and the accompanying lettered exhibits deal with the wage differential between the north and south in the cotton goods manufacturing industry. The source of the data is the article "Historical Review of Wage Rates and Wage Differentials in the Cotton Tex-

tile Industry" which appeared in the May, 1935 issue of the Monthly Labor Review. From table 1 we have selected one of the important male occupations, loom fixers, and one of the important female occupations, namely, weavers, and have charted on the two charts which follow, the average hourly earnings in these two occupations. It will be seen here that there was a very sizeable difference (1577) throughout this period in the average hourly earnings of these occupations in New England and the south-atlantic states. Coming to Exhibit marked 74-C, and headed Table 2, Ratio of Average Hourly Earnings of New England to Those in South-Atlantic States, By Occupations, we find at the bottom of this table a weighted average which measures the differential between New England and the south-atlantic states, in all the occupations represented. In Defendants' Exhibit 32-A we find the column to the [fol. 746] right, near the top of the page, "Percent Group B Is Of Group A". That was the exhibit on the differentials between north and south in bituminous coal mining. On Exhibits 74-D and 74-E we compare the wage differential between Group B and Group A states, as given in Defendants' Exhibit No. 32-A, with the wage differential in the cotton textile industry, as given in the study previously referred to. The actual figures are shown by years on the exhibit marked 74-D and the situation is shown graphically on the chart marked 74-E. It will be seen that the wage (1578) differential between the north and the south was in each and every year represented in the cotton textile industry, considerably larger than it was in bituminous coal.

[Plaintiff's Exhibits Nos. 75, 75-A, 76, 76-A, 76-B, 77, and 77-A, previously marked for identification, were offered and received in evidence.]

The table 75-A is a copy of a table appearing in the article "Review of Industrial Disputes in the United States from 1919 to 1933" in the Monthly Labor Review of the Department of Labor. From that table we have taken four industries and have charted their trend over the period represented. These are coal mining, building trades, cloth- [fol. 747] ing, and textiles. It will be observed that during the years 1919, 1920, and 1921 the building trades had far more industrial disputes than any of the other industries

represented on the chart. (1579) Those four industries selected had more industrial disputes than most of the other industries. We find that there are some other industries, such as metal trades, which had more industrial disputes in 1919 than any other industry, and had considerably more than coal mining. We also find an industry such as transportation which had a large number of industrial disputes in 1919. The four selected are representative of those industries which have had the largest number of strikes, although they are not necessarily the industries which have had the largest number of strikes in each year in the entire period. I suggest only that coal mining has had less strikes than the four industries named. Exhibits 76, 76-A, and 76-B explain themselves. 76 and 76-B are merely supporting data for the chart 76-A, which summarizes the situation during the 10-year period from 1924-1933, and which shows the importance of days idle on account of labor disputes.

(1580) [Plaintiff's Exhibits Nos. 78, 78-A, 78-B, 78-C, 79, 79-A, 79-B, 79-C, 80, and 80-A, previously marked for [fol. 748] identification, were offered and received in evidence.]

(1581) Exhibit 77 shows the number of days idle by causes for each of the 10 years in the period from 1924 to 1933. It will be seen that with the exception of 1927 the number of days idle on account of strikes, suspensions, and lockouts are only a very small part of the total number of days idle in the industry. On Exhibit 78 we show the situation in individually selected states, namely the four states in the central competitive field: Ohio, Illinois, Indiana and Pennsylvania; and in addition, the State of West Virginia. The figures represent the average number of days idle because of strikes per year per man employed. Comparing the states in the central competitive field with West Virginia, it will be seen that Ohio had more than 16 times as many days idle on account of strikes per year per man employed than West Virginia. Illinois had over 13 times as many as West Virginia; Indiana, 10 times; and Pennsylvania over 4 times. Exhibit 78-A shows the situation in all four of these states combined; namely, Pennsylvania, Ohio, Illinois, and Indiana, comprising the competitive field. For all four of these states combined it would seem that the number of

days idle because of strikes per year per man employed [fol. 749] was over 8 times as large as it was in West Virginia during that period. (1582) Exhibit 79 compares man-days idle on account of strikes with bituminous coal production in these various states. It will be seen that during the 10-year period from 1924 to 1933, 22.7% of the man days idle on account of strikes were in Pennsylvania as compared with 26.1% of bituminous production. In the case of Illinois, Indiana and Ohio, we show that their proportion of man-days idle on account of strikes is considerably larger than their proportion of bituminous coal production, those four states combined accounting for 86.2% of all the man days idle on account of strikes in bituminous coal mining, whereas they accounted for 46.2% of the production. This is in contrast to the situation in West Virginia, which accounted for only 4.2% of man-days idle on account of strikes in bituminous coal mining as compared with 25.7% of the production. (1583) Exhibit 79-B shows the number of man-days lost on account of strikes per thousand net tons of bituminous coal. On this basis, as on the other, it is seen that the number of man-days lost on account of strikes is much larger in the central competitive field—Pennsylvania, Illinois, Ohio, Indiana—than it has been in West Virginia. On Exhibit 80, we have summarized from 1913 through 1933 the data for the entire United States on strikes, suspensions and lockouts in the bituminous coal [fol. 750] mining industry. It will be observed that during the last 10 or 12 years the data recorded by the Bureau of Mines in their tables covered five points: the number of men employed, the number of men on strike, the man-days idle on account of strikes, the average number of days lost per strike, and the average number of days lost per man per strike. In one of the exhibits prepared by the Government (Plaintiffs' Exhibit 66) they showed by years and by states only three of those factors, namely, the number of men on strike, the man-days idle per man per strike, and the average number of days lost on strike per man on strike. We are supplementing the table which they prepared by the information on the other two points mentioned, which will enable one to evaluate the seriousness of industrial disputes in each of these years by supplying the data on the number of men employed and the number of days lost per man days employed.

(1584) [Plaintiff's Exhibits 81 through 81-Y, previously marked for identification, were then offered and received in evidence.]

The Government states that bituminous coal is produced commercially in 26 states, and that more than 70% of the bituminous coal is produced within four states. We show the situation with respect to the other important commodities and industries. Exhibits 81, 81-A, and 81-B purport to [fol. 751] represent graphically the allegations in the Government's answer in regard to the number of states in which the bituminous coal was produced. (1585) The other graphs are prepared in the same way, they first show the number of states in which the particular product is commercially produced, and then separately show the number of states in which a substantial percentage thereof is produced. Exhibits 81-C, 81-D, and 81-E show that anthracite or semi-anthracite coal is produced commercially in five states, and 99% of the total production in 1933 was produced in one state, Pennsylvania. Exhibits 81-F, 81-G, and 81-H show that iron ore is produced commercially in 10 states and in 1933, 94% of the production was accounted for by three states. Exhibits 81-I, 81-J, and 81-K show that copper is produced in 18 states and 79% of the production in 1933 was accounted for by four states. The further exhibits show that salt is produced commercially in 13 states and 80% of the production of it was accounted for by four states; oranges are produced commercially in five states, but seven states account for 98% of the total production in the 1933-1934 season; motion pictures were produced in 16 states, two of which account for 95% of the total; (1586) motor vehicles, not including motorcycles, are produced in 23 states, 4 of which account for 67% of the total value of production. In connection with motor ve- [fol. 752] hicles, attention should be called to the fact that the Census of Manufactures treats assembling plants as manufacturing establishments. If automobile plants were not treated as manufacturing establishments, it is probable that you would see a much greater concentration of the motor vehicle industry in a smaller number of states. The final exhibit (81-W) summarizes the total United States production of the above commodities which are produced within a specified number of states.

Exhibits 82, 82-A, and 82-B deal with the annual earnings, calculated, of trackmen employed in bituminous coal mines in selected states, 1922 to 1933, and of hand loaders. The actual earnings are calculated by multiplying the average earning power per day by the average number of days worked. Information on the average number of days worked was supplied by the United States Bureau of Mines. (1587) Information on the average earnings per day was supplied by the Bureau of Labor Statistics.

[Plaintiff's Exhibits 82, 82-A, and 82-B, previously marked for identification, were offered and received in evidence.]

[fol. 753] (1588) [There was offered and received in evidence the release of the National Bituminous Coal Commission, dated November 11, 1935, which was marked Plaintiff's Exhibit 83.] This was read into the record as follows:

PLAINTIFF'S EXHIBIT 83

"National Bituminous Coal Commission. Immediate Release

November 11, 1935.

"Latest estimates based upon figures by Acting Deputy District Secretary to the National Bituminous Coal Commission show that producers representing approximately 212,252,000 tons production during 1934 have given assent to the Bituminous Coal Code. That figure represents an increase of more than 12,250,000 tons over the total tonnage reported on Friday last. Additional acceptances are coming in daily."

(1592) [There were offered but refused admission to evidence by the Court the following: Official circular copied from the United Mine Workers Journal of November 1, 1935, the circular being dated October 21, 1935—which was marked "Plaintiff's Exhibit 84"; and copy of editorial page of the United Mine Workers Journal of November 1, 1935—marked "Plaintiff's Exhibit 85."]

[fol. 754] (1629) STANLEY ANTHONY WILLER, heretofore called as a witness in rebuttal on behalf of the plaintiff, was recalled and testified further as follows:

Further Cross-examination.

By Mr. Critchlow:

On Plaintiff's Exhibit No. 68 is shown a group of seven states in which the production in 1930 exceeded that in 1913, the production in all other states being less in 1930 than in 1913. Percentagely, North Dakota had the largest increase, although in number of tons other states, notably West Virginia, had a much larger increase. (1630) The increase of North Dakota is 243%. In other words, the North Dakota 1930 production is 343% of 1913 production, representing an increase of 243%. (1631) In tonnage, the items upon Exhibit 68 under "Other States" showing that the percentage of North Dakota in 1930 was 243.5% and the State of Utah showing 130.8% and the State of South Dakota showing 121.5%, were relatively insignificant compared with the total production of the country. The table (Plaintiff's Exhibit No. 68) is a copy of Table 10 on page 626 of "Coal in 1930" exactly as is, with the exception of the last column entitled "Percentage 1930 is of 1913". That is the only calculation which we have made and the only change which we have made in the table as it appears exactly in the Bureau of Mines report. (1632) It is readily apparent from this table that the only states which have increased tonnage whose tonnage is at all significant are Kentucky, West [fol. 755] Virginia and Virginia. Those are the states that were the B Group referred to by Mr. Berquist in exhibits introduced by the Government when he was on the stand. With respect to Plaintiff's Exhibit No. 69, I have had no occasion to make a specific study as to whether by the year 1923 substantially all the coal fields now in production had already been opened up and developed. I could not state positively that that is true.

Referring to Plaintiff's Exhibit No. 72-A the selection of the industries shown were made from the Statistics of Income published by the Bureau of Internal Revenue, United States Treasury Department. (1633) There are 91 industries listed in the tabulation from which the selection was made, including a group entitled "Nature of business

not given". 9 are shown in Plaintiff's Exhibits No. 72 and 72-A and of them, aside from coal, 4 showed a deficit. (1636) [There were offered and received in evidence the following: Defendants' Exhibit No. 49—Table entitled "Net Income or Deficit of Specified Industrial Groups, 1926-1932"; and Defendants' Exhibit No. 49-A—Statement entitled "Summary Statement of Industry Groups Reporting Losses, According to Statistics of Income Published by the U. S. Bureau of Internal Revenue, for the Years 1925-1929, Inclusive". [Mr. Critchlow then pointed out that as shown by this table and this statement, in the entire period from 1926 to 1929 there were only three groups other than coal which showed a net deficit, those being: Woolen and worsted [fol. 756] goods, showing a net deficit of $1,411,000; shipbuilding and repairing, showing a net deficit of $5,889,000; and aerial transportation, showing a net deficit of $5,944,000. (1638) At the suggestion of the Court, Defendants' Exhibit 49-A was copied into the record, as follows:

"DEFENDANTS' EXHIBIT 49-A

"Summary Statement of Industry Groups Reporting Losses, According to Statistics of Income Published by the U. S. Bureau of Internal Revenue for the Years 1925-1929, Inclusive.

"1925

"In the year 1925, out of a total of 33 industry groups there were three which reported an excess of losses over profits.

"One of the three was coal mining, including both anthracite and bituminous. No separation of the figures on income as between anthracite and bituminous coal was made in the year 1925.

"The industry groups showing an excess of losses over profits in 1925 were as follows:

"1. Coal mining.

"2. Mining and quarrying—holders and lessors.

"3. Nominal concerns—inactive and nature of business not given.

"1926

"In the year 1926, out of a total of 68 industry groups, there were three industry groups which reported an excess of losses over profits.

"The industry groups reporting an excess of losses over profits were as follows:

"1. Cotton goods—dress goods, cotton yarn, napping, [fol. 757] and dyeing, etc.

"2. Accident, casualty, fire, marine, mutual, fidelity and bonding companies.

"3. Nominal concerns—nature of business not given.

"1927

"In the year 1927, out of a total of 88 industry groups there were seven which reported an excess of losses over profits.

"The industry groups reporting an excess loss over profits were as follows:

"1. Coal, bituminous and anthracite, peat, coke, etc.

"2. Oil and gas.[1]

"3. Fertilizers.

"4. Ship building and repairing.

"5. Aerial transportation.

"6. Auto bus lines, taxicabs, and sight-seeing companies.

"7. Nature of business not given.

"[1] The over production of crude petroleum in the latter part of 1926 and during 1927 resulted in a general reduction in posted prices. This decline had a material effect on total value at wells, which was 19 per cent lower than in 1926, in spite of the fact that the total quantity produced in 1927 was 17 per cent higher. The total value in 1927 was $1,172,830,000, an average of $1.30 per barrel, or a decline of $0.58, or 31 per cent, from 1926.

(Source: Mineral Resources of United States, 1927, part II, page 513.) The overproduction mentioned above was due largely to the development of the pools in the greater Seminole district of Oklahoma.

(Source: Ibid., page 511.)

[fol. 758] "1928

"In the year 1928, out of a total of 91 industry groups there were seven which reported an excess of losses over profits.

"The industry groups reporting an excess of losses over profits were as follows:

"1. Bituminous, lignite, peat, etc.

"2. Woolen and worsted goods—wool yarn, wool carpets, wool pulling, etc.

"3. Tires and tubes, etc.

"4. Ship building and repairing.

"5. Theaters, legitimate, vaudeville, etc.

"6. Joint stock land banks.

"7. Nature of business not given.

"1929

"In the year 1929, out of a total of 91 industry groups there were nine which reported an excess of losses over profits.

"The industry groups reporting an excess of losses over profits were as follows:

"1. Bituminous, lignite, and peat.

"2. Woolen and worsted goods, wool yarn; dress goods, wool pulling, etc.

"3. Other leather products—gloves, saddlery, harness, trunks; finishing and tanning leather, etc.

"4. Radios, complete or parts.

"5. Ship building and repairing.

"6. Aerial transportation.

"7. Theaters, legitimate, vaudeville, etc.

"8. Joint stock land banks.

[fol. 759] "9. Nature of business not given.

"W. H. Young, Coal Economics Division, Bureau of Mines.

"November 14, 1935."

(1642) As stated in Plaintiff's Exhibit No. 75, it refers only to the number of industrial disputes in the specified industries. It is perfectly possible, and it is a fact, that one dispute, for instance, the dispute in 1922 in the coal mining industry, although it may be listed as one dispute, may involve a great many more men than a large number of disputes in another industry which I have referred to in this exhibit. That is also true of coal. In other words, it is quite possible that the 44 industrial disputes in coal mining in 1922 involved more men, more man-days lost, than the 158 disputes in 1923. (1643) The table does not purport to show anything about the extent of the disputes shown or the number of men involved. It merely purports to show that this number of disputes occurred in the years mentioned. There are no data on these other industries issued by the Bureau of Labor Statistics, showing the number of man-days lost on account of strikes and the number of men involved. Specific inquiry has been made on this point and we have been informed by the Bureau of Labor Statistics that those data are not available for these industries over a period of years.

(1644) Referring to Plaintiff's Exhibit No. 73, entitled [fol. 760] "Average Hourly Wage Rates Paid Common Labor" at the top of which is the statement "Average Hourly Entrance Rates in Cents", the phraseology "entrance rates" is that of the Bureau of Labor Statistics as found on page 303, Table 333, of the Statistical Abstract for 1934, with the exception of the 1934 figures, which are from Serial No. R-196 of the December, 1934, issue of the Monthly Labor Review. The statement there made is the same as that given on Plaintiff's Exhibit No. 73, namely:

"NOTE.—Rates in cents per hour. Data are based on entrance rates paid unskilled adult males in important industries requiring considerable numbers of common laborers."

It is stated in the Monthly Labor Review for October, 1933, in connection with entrance-wage rates for common labor, that rates of pay are increased by some employers after a stated length of service, or after a certain degree of fitness for his job has been developed. (1645) I rather assume that when employees advance from this particular class they would not be considered common labor. As to whether

or not the Bureau of Labor Statistics would still regard them as common labor I do not know. At any rate, the Bureau of Labor Statistics confines its figures on the average hourly wage rates for adult male common labor to this particular classification. I do not know whether any other classes of common labor are recognized by the Bureau, but they do not report upon them. Referring to Plaintiff's [fol. 761] Exhibits No. 73 and 73-A, I do not see what bearing these exhibits have upon my understanding of the difference between common labor and skilled labor. I have taken the classifications used by the Bureau of Labor Statistics and have presented them in the manner given in the official reports of the Bureau. That is all I claim for them.

(1646) Referring to Plaintiff's Exhibit No. 70, the figures as to bituminous coal were obtained from the Bureau of Labor Statistics, United States Department of Labor, and the figures for all commodities and raw materials were obtained from the same source. I am aware that quotations for bituminous coal used by the Bureau of Labor Statistics represent the delivered price, including freight, rather than the price f. o. b. mine. They were so stated here, as wholesale prices. (1647) I think it is substantially the case that for many years the average freight charge has exceeded average realization f. o. b. mine. I do not recall specific figures for the year 1929 as to average sales realization f. o. b. mine and average railroad freight revenue per ton. I might say that the figures in Plaintiff's Exhibit No. 70 are on a directly comparable basis. In other words, the wholesale prices of raw materials reflected the freight and transportation charges involved in bringing them to the primary markets to which these quotations apply. The same is true of all commodities. The same is true of the chart which follows, Plaintiff's Exhibit No. 70-A. In other words, all of these are on a comparable basis and were taken [fol. 762] exactly in the form given by the Bureau of Labor Statistics. I note in Minerals Year Book that it gives for 1929 the average f. o. b. mine price for bituminous coal and the average rail freight revenue per ton for that year, namely, $1.78 realization price and $2.25 freight revenue. (1648) It is my understanding that freight charges remained substantially unchanged during this period. I do not pretend to be an expert on freight costs. It might be claimed that the fact that half the cost of delivered coal

is made up of freight which did not tend to change, is one of the reasons why bituminous coal has shown relatively small changes in price since 1926, as reflected in the wholesale prices. It may be a fact. These charts are concerned only with the actual facts, namely, the wholesale prices. As to what enters into the determination of these wholesale prices, whether it is bituminous coal or all commodities or raw materials, is something which is beyond the prices themselves. According to the Bureau of Labor Statistics these figures represent an accurate index of the trend of the wholesale prices of the commodities represented. (1651) I have not had occasion to study the freight costs on the 785 commodities included in the all-commodity index by the Bureau of Labor Statistics. (1652) I chose the year 1926 as my starting point for Plaintiff's Exhibit No. 70 because that is the year taken as a base by the Bureau of Labor Statistics of the United States Department of Labor. The Bureau has compiled index numbers for a number of years [fol. 763] previous to 1926, 1926 being used as a base. However, in these previous years, a smaller number of commodities were included in the index, and therefore the indexes for those previous years are not directly comparable. We accepted the base year and the starting point of the Bureau of Labor Statistics. (1653) That Bureau is the recognized authority on price trends. If we had started with 1924, 1922, 1918 or some other year, we might have been accused of being selective in our choice of years, so we merely accepted the Bureau of Labor Statistics' choice. I do not think it would have been fairer to start with 1923. (1654) [Mr. Critchlow handed a tabulation to the witness, stating that it had been prepared by Mr. Berquist.] It would seem that the caption of this table is not entirely correct. It says "Index Numbers of Wholesale Prices of Specified Commodities or Commodity Groups" and then it gives bituminous coal, average realization, f. o. b. mine. According to the Bureau of Labor Statistics that does not constitute a wholesole price. (1655) When we talk about wholesale prices we talk about them in the sense that they are accepted and so regarded by such an authority as the Bureau of Labor Statistics. That Bureau does not regard the bituminous coal average realization f. o. b. mine as a wholesale price. As to whether it is correct or incorrect in not so regarding it, I do not care to speak. (1656) [Mr.

Critchlow then offered the tabulation in evidence. (1657) [fol. 764] The tabulation was received in evidence as Defendants' Exhibit No. 50, it being entitled "Index Numbers of Wholesale Prices of Specified Commodities or Commodity Groups.]

(1658) [There was then offered in evidence as Defendants' Exhibit No. 51 a table entitled "Production Value, Men Employed, Days Operated, and Output Per Man Per Day in Coal Mines in West Virginia, 1934". (1661) The exhibit was received in evidence.]

[fol. 765] (1593) JAMES WALTER CARTER, the plaintiff, called as a witness on his own behalf in rebuttal, testified further as follows:

Direct examination.

By Mr. Whitney:

I was in Court when Mr. Richards testified as to the classification of Caretta coal and I heard that testimony. The Smokeless Code Authority first issued classifications of prices on or about October 3, 1933. They were revised thereafter approximately once a month. I was elected a member of the Code Authority on March 12, 1934. The discriminatory price which I previously testified to in regard to Caretta coal was fixed (1594) in the first circular establishing classifications of coals and prices therefor which was issued on or about October 7, 1933.

The house plant of the Carter Coal Company is representative of the house plants of more modern (1595) coal mining plants generally in the area in which it is situated. There are about 950 houses in the two mining villages of Carter Coal Company in southern West Virginia. Approximately 75% of those houses have commodes connected with a sewerage system, or bathrooms. There are in the towns about 360 garages, all of which are filled with cars of employees. (1596) There are in addition in the two villages about 50 other cars owned by employees, for which there [fol. 766] is not room in garages that are built for the houses. In the two communities having house plants of 950, there are today approximately 450 automobiles owned

by employees. I believe that all of the houses have electric lights and that substantially all of them, even those that do not have the modern sewerage system facilities, have running water in the houses. Garbage is collected and disposed of at garbage dumps by men who devote their entire time to the collecting of refuse and garbage, as is done in any other well regulated community.

There are hard-surfaced roads through substantially all portions of the mining villages, but not all of the houses are built on hard-surfaced roads.

Modern schools are operated by counties in which the mining towns are located. There are in those two villages about 34 or 35 school teachers. The schools are grade schools, and the children there who are in high school are transported from the villages to high schools by bus, transportation being free.

There is a community church for the white employees and there are Methodist and Baptist churches for the negro employees. (1597) There is one white minister and there are six colored ministers in the two villages.

In so far as I know, Carter Coal Company has never had [fol. 767] any of the so-called "yellow dog" contracts.

I have caused a very complete, detailed study to be made of the coal loaders at one of our large mines for the month of July of this year. This study was applicable to a period prior to the recent advance in rates of pay. It includes all of the employees loading coal at that mine for that month. That would mean that the range would include those men who worked one day during the month and those men who worked on all of the days when work was available for them. [The chart showing the average earnings for 1935 and average expenditures that are required to be made therefrom in respect of loaders at the Olga No. 1 mine was offered and received in evidence as Plaintiff's Exhibit 86.]

(1598) This chart discloses that the average earnings per day for that month for those employees was $5.50, and that the occupational deduction was an average per day for each of those men of 11¢. That covered the cost of smithing and the cost of electric mine lamps. It did not cover the cost of explosives. It is the practice of the company to sell to its employees at cost the explosives that are required in the mining process. In so far as we can

ascertain, the cost per day for those explosives would be about 30¢. The study also disclosed that the average [fol. 768] amount per day paid by those men for rent was 17¢, the cost of group insurance and payroll fund was 13¢ average per day, the cost of doctor and hospital was 11¢, heat and light were 8¢, union dues, union fees, and checkweighman were 9¢, miscellaneous charges, including bathhouse, garbage, and any checks purchased by the men for use in the mine, were 2¢. After all deductions that I have enumerated there was left from the $5.50 average earning, $4.79. These are the average earnings per day from which each particular employee would pay the cost of food and clothing and the cost of explosives which, as I previously stated, is estimated at about 30¢. (1599) This is based upon an accurate analysis from the books of the company of this particular mine for that month.

The health of the employees in these mining towns is very good. When men are employed by the company they are examined and only those men who are in sound health are employed. The families of those men and the men themselves receive without any cost inoculation against typhoid, the children receive inoculation against diphtheria and all members of the communities are vaccinated to prevent smallpox. I have been advised that there have been [fol. 769] no cases of typhoid in the communities since 1925 and that there have been, so far as we can discover, no cases of smallpox. In the last 12 months there were two mild cases of diphtheria among the children. There have been reported two cases of tuberculosis in the last 12 months. The health of the communities is, I should say, equal to or better than the average of similar sized towns throughout the country. The company employs two nurses who examine the children in the schools, who visit the homes and advise as to the child welfare and sanitation in the homes. There is also in effect an arrangement by which the employees of the company may secure hospital attention for themselves and for any members of their family, which includes any emergency illness or accident to which they may be subject, excluding certain chronic cases that would not or could not properly be insured against by hospital authorities. (1600) The cost of this service to the employees is, for a single man, $1;

and for men with families, $1.50 a month. The cost is reflected in the item on the chart to which I have referred under the heading "Doctor and Hospital".

The company maintains a number of company stores. The merchandise as to volume and variety is comparable to that of any independent stores in the general community and is, in my opinion, better than the average that is found in such independent stores. It is the practice [fol. 770] of the company to base its prices upon the prices charged in chain stores operating in the same general community, and the prices charged by the Carter Coal Company for merchandise sold by it are as low as or lower than the prices charged by chain stores in the community.

By "scrip" we really mean a process of advancing funds to employees in the coal industry before the payday period. It is customary in the Carter Coal Company and in other companies in that community to pay employees twice a month. Men who wish advances against their earnings secure them from the payroll clerks in the form of bits of paper or metal coins which are accepted at the company stores at their face values for merchandise sold. It is a practice that is really a convenience for the employees throughout that region as a whole.

(1601) During the depression, Carter Coal Company, in common with other coal companies in that region, furnished to its employees as much employment as it could. It has been the practice in the coal industry—certainly in the southern fields of West Virginia—when work was not available to employees or to those people who had been employees of the companies for considerable periods, to extend credit to them, the amount usually depending upon the resources of the companies and the length of service of the employees. I believe it is generally true that the [fol. 771] producers in that section, to the extent of their resources, did what they could to alleviate and prevent distress incident to the depression. [Mr. Whitney asked the Court to take judicial notice of the fact that it is common knowledge that in the depression it was the usual or frequent practice of industrial concerns to shut down factories, with the result that the employees were completely unemployed and had either to get other employment or else go on relief.]

(1602) Because of the fact that coal mines must be opened and developed in those areas where coal occurs, and because, further, such communities are frequently in areas that are far removed from other opportunities for employment, employees are and must be more dependent upon the companies and the companies feel a greater responsibility for their employees than exists in other industries, in times of depression. (1603) Based upon such information as I have had in the industry and upon my contacts with operators in various parts of the country operating mines during the depression period, the operators did, to the best of their ability, aid those employees dependent upon them.

Unquestionably very distressing conditions of want, in times past during the depths of the depression, have been present in the coal industry. I have myself observed conditions of great distress in communities other than coal communities, even in some of our large towns and cities, [fol. 772] during the depths of the depression. (1604) I know that some of those areas about which witnesses for the Attorney General have testified were below-normal areas in the coal industry, even under more prosperous times and conditions than during the depths of the depression. Some of those areas were in regions developed many years ago, when the standards of industrial life and opportunities for comfortable living for employees in industrial plants were less than they have been in more recent years. Some of those areas were fields developed 50 and 75 years ago. Mining towns built at that time are very different things from mining towns built in more recent periods. Mining towns in communities that have been substantially abandoned or worked out are naturally allowed to fall into disrepair and to go to pieces, as are the abandoned operations of any other industry. During the depression, people who found themselves there when abandonment came or when there was practically no operation of the mine, had no other place to go. It was not a condition, however, that was peculiar to the coal industry. Industries as a whole suffered during the depression.

(1605) I have been in mines in West Virginia in various parts of the State, and I am somewhat familiar with mining areas in Kentucky. I am not personally familiar with

mining areas in Tennessee. In the coal industry and in West Virginia and Kentucky particularly, as in other industries, there are all kinds of mine plants. There are mines opened by adventurers, speculators, on small tracts of land, men who had very small resources and who made [fol. 773] flimsy developments at some time when the profits in the coal industry seemed inviting. Such ventures are naturally of very indifferent quality. They produce, although numerous in number, a comparatively small part of the total production of coal. The great bulk of coal mined is produced by stronger companies with better equipment, facilities and conditions of life for their employees, than prevail in the distressing situations to which defendants' witnesses referred. The bulk of coal produced in the southern fields is from mining plants that are more modern and which are better equipped than many of the mines in the older regions of the country, sometimes referred to by witnesses as "north of the river". That naturally follows because the development in the southern fields is more recent. The plants are more modern. (1606) The mines have been developed in recent years, when the knowledge of mining and methods of mining was better. They have modern equipment and electrical apparatus. The larger part of the process is mechanized. Individual men can accomplish more with less labor because of the mechanical appliances and devices that are available to them.

Plaintiff's Exhibits Nos. 82, 82-A, and 82-B were prepared under my direct supervision and pursuant to my instructions. Certain of the defendants' witnesses have referred to the rates of pay of trackmen as having been basing rates in certain parts of the country, and one of these witnesses pointed out discrepancies in these rates of pay in [fol. 774] different mining regions in different mining States. Such information as was available to me was taken as the basis for this chart. Mr. Willer referred to the number of days worked in each State as having been derived from the United States Bureau of Mines publication, and data with respect to that matter. The average earnings per day were as reported by the Bureau of Labor Statistics, which one of the defendants' witnesses, Mr. Lubin, directs. These exhibits show that earnings, as distinct from rates of pay, have been somewhat similar and have followed somewhat the same course in the last several

years in all states. In other words, that those men in the southern states have earned as much, (1607) or substantially as much, at the lower rates of pay, as have the men in the older fields in the north at the higher rates of pay. This particular classification of trackmen is a specialized kind of employment. They do not represent a great percentage of the men in a coal mine—perhaps 5% or 10%. The second chart, 82-A, would apply to a greater number of men. That discloses that the pieceworkers who, in the southern fields, number probably half the employees in a mine, and in many of the mines in the east, particularly in Pennsylvania, may number as many as three-fourths of the men in the mine, receive, in the southern fields, a lower rate of pay than they do in some of the northern fields. The chart would indicate, however, that in the case of West Virginia pieceworkers have earned more in annual earnings than have the pieceworkers in the State of Pennsylvania throughout this period, with the exception of one [fol. 775] year. That is significant because of the fact that pieceworkers in Pennsylvania are a larger percentage of the employees in the mine than they are in the southern states. It also indicates that Ohio has been generally lower than any of the five states that have been charted here—Illinois, West Virginia, Pennsylvania, Kentucky, and Ohio, so that the pieceworkers in Ohio, notwithstanding that their rate of pay was higher, have actually earned less than have the pieceworkers in the other states.

(1608) By the Court:

The way the information on the chart, Exhibit No. 83, was derived is this: During the month of July, 1935, there were 566 coal loaders in that particular mine. That was about half the number of employees—all of the pieceworkers. Of those men there was one man who worked one day, there were other men who worked two days, and some three. The individual payments made to each man were broken down in this fashion and the average of all, including the men who worked one day and the men who worked all the days that were available to them are included there. (1609) One of the Carter Coal Company villages is about a mile, by hard-surface road, from a so-called open or independent town in which numerous independent stores exist. The other village is about five miles, by hard-surface road,

to the county seat, which is quite a substantial town in which there are many independent stores. In the villages themselves there are only company stores.

[fol. 776] (1613) [A table showing the number of days worked by employees at Carter Coal Company for July, 1935, was marked Plaintiff's Exhibit No. 87 for identification.]

By the Court:

As shown by this statement in the month of July the men were offered work for 23 days and some of them worked fewer days. This means that it was optional with the men to work less than 23 days if they wished. The explanation of cases where men worked only one or two days would probably be that the men had been recently employed or had moved away and left their employment about the beginning or end of the month. Of course, not all of the men worked all of the days work was available for them. Probably one-fourth of the men would work less than half time. The men were permitted under the agreement with representatives of the employees to work five days in each calendar week. Some of the men may not have desired to work five days. Some of the men will be employed by the company (1614) for a short time and will move about to other places for employment, so that the average earnings of all men is very much diluted when you take into account those particular cases. The bulk of the men will work half or more of the days when work is available for them.

By Mr. Whitney:

Indolence might be one of the reasons why men did not work all of the time for which work was available, another being the fact that sometimes men are moving about.

[fol. 777] By the Court:

Illness might account for it. There was work for all of the men during each of the 23 days if they wished for or were able to do the work. [The table marked Plaintiff's Exhibit No. 87 was then offered and received in evidence.] (1616) [There was offered and received in evidence a table of average earnings of employees of Carter Coal Company

prepared for the West Virginia State Compensation Commission, as Plaintiff's Exhibit No. 88.]

By Mr. Whitney:

Carter Coal Company has not to my knowledge deprived workmen of that to which they were fairly entitled from the point of view of measurement.

(1617) Cross-examination.

By Mr. Critchlow:

There have not always been scales at the tipple of the Carter Coal Company's property. Scales were installed, I believe, about 1923 or 1924.

In February, 1922, my father sold to Consolidation Coal Company all of the voting stock of Carter Coal Company. In addition, (1618) Consolidation Coal Company entered into an agreement obligating itself to purchase preferred stock of Carter Coal Company over a period of time, which shares were held by my father. The agreement also provided that the preferred shares as they were from time to time purchased by Consolidation should be surrendered by [fol. 778] that company to Carter Coal Company for cancellation and retirement. After that contract was entered into, Consolidation Coal Company assumed the management and control of Carter Coal Company, as the owner of all the voting stock. During a period of time Consolidation Coal Company owned all of the voting shares of Carter Coal Company. It lent to that company sums of money and that money was used by the Carter Coal Company to make certain improvements, for working capital and for other purposes. Substantial sums of money were so advanced. Consolidation Coal Company went into receivership in 1932. (1619) Carter Coal Company was indebted, as shown by the books of the company, to Consolidation Coal Company in a sum in excess of $10,000,000 at the time Consolidation went into receivership. When Consolidated Coal Company was in receivership there still remained in existence the contract obligating Consolidation Coal Company or its receivers to purchase the shares of preferred stock that were owned by my father and members of his family. The Consolidation Coal Company or its receivers did not desire

to consummate that purchase. Carter Coal Company was recapitalized and the indebtedness to Consolidation Coal Company (1620) was cancelled in exchange for the issuance to Consolidation Coal Company of 30,000 shares of voting stock of Carter Coal Company, the old voting shares being changed into non-voting shares. 50,000 shares no par value became 10,000 shares of par value of $1 with no voting power. The voting shares were purchased by me and the [fol. 779] bonded indebtedness, which was part of the debt of the company, was included in this indebtedness for which Consolidation received new shares of stock. The agreement to purchase the preferred shares was cancelled. This arrangement was consummated in March of 1933.

[A tabulation entitled "Carter Coal Company, Condensed Statement of Income Account by Years, 1923-1934, Inclusive," was marked Defendants' Exhibit No. 47 for identification.]

This statement was prepared or caused to be prepared by me at your request. It shows information as disclosed by the books of the company for the periods 1923 to 1934. (1621) [The tabulation previously marked Defendants' Exhibit No. 47 was thereupon offered and received in evidence.]

I have prepared a statement at your request purporting to show the aggregate of contracts entered into since May 27, 1935, by Carter Coal Company for the sale of coal, and the average price per ton. This statement covers all contracts for terms of one year or longer, which cover an aggregate of 850,750 net tons of coal. The second paragraph refers to 230,000 net tons that have been contracted for since August 30, 1935. (1622) The statement to which you refer reads "The aforesaid tonnages, approximately 230,000 net tons, have been contracted for since August 30, 1935". These contracts all provide for delivery for a period longer than 30 days from the date of the contract, each being for a period of more than one year. These contracts cover different sizes and different grades of coal, [fol. 780] more than 95% of which is so-called slack or fine coal.

By the Court:

Substantially all of the coal covered by all of the contracts described is slack.

By Mr. Critchlow:

The company has been operating at substantially full capacity during all of the year 1935.

The houses in the two villages surrounding the mines of Carter Coal Company were constructed over a period of 35 years. (1623) I should say that half of them had been constructed within the last 15 years. The most modern houses have been constructed during the period when the management of the company was directed by Consolidation Coal Company. It is not true that all of these so-called modern houses were built during that time.

The purpose of Plaintiff's Exhibit No. 79 is to show the relationship between the man-days idle on account of strikes and the production of certain specified states. The witnesses for the defendants have testified that the states of Pennsylvania, Illinois, Indiana and Ohio were during a part of the period about which you have inquired unionized, while during most of that period the state of West Virginia was substantially non-unionized. (1624) The Bureau of Mines reports contain the information that the state of West Virginia is credited with 25.7% of the pro- [fol. 781] duction of coal, whereas it had only 4.2% of the man-days lost on account of labor disputes. As has been testified before by one of the witnesses for the defendants, the operators in West Virginia were, during these ten years, generally opposed to the unionization of the fields in West Virginia. It was customary during the greater part of that period for the operators to enter into individual contracts of employment with their men, if by "individual contract" is meant that when a man secures employment from an employer he has an individual contract of employment. (1625) I am informed and I believe it to be a fact, that certain companies in certain parts of West Virginia have written contracts of employment with certain of their employees and that some of those contracts of employment which were reduced to writing contained a provision to the effect that the employee should not join a union. I have seen blank forms of such contracts, although I have never seen an executed contract of that kind. The Carter Coal Company did not have written contracts of employment with its employees and had no such provision, either written or verbal, with the men who worked for it. (1626) I have no personal knowledge as to when

employees of the Carter Coal Company became members of a labor organization. I do not know when the employees or any particular employee became a member of any specified labor organization. I do know that organizers of the United Mine Workers, perhaps organizers of other organizations, came to the properties of the company almost im- [fol. 782] mediately after the enactment of the NIRA and began soliciting the employees to become members of that organization. Carter Coal Company first agreed with representatives of its employees collectively with respect to wage rates and terms and conditions of employment a month or so before the passage of the NIRA. (1627) The first scale of wages agreed upon between representatives of the employees of the company and the management was done by the so-called local or company union. Only one such contract was entered into. That was superseded after the men became members of the United Mine Workers of America and selected the officials of that organization to represent them in collective bargaining. Since that time the men have been so represented.

Plaintiff's Exhibit No. 86 does not have anything to do with rates of pay, but has to do with average daily earnings of piece workers at one time. (1628) Rates of pay are set out in the agreement under which the employees of Carter Coal Company are operating.

[fol. 783] OFFERS IN EVIDENCE

(1667) [There was offered and received in evidence as Plaintiff's Exhibit 89, regulations issued by the Department of Taxation in respect to taxes under the Bituminous Coal Conservation Act.]

(1669) [There was offered and received in evidence as Defendants' Exhibit 52 a two-page table entitled "Relative Rate of Growth of Coal, Oil and Water Power."]

(1670) [There was offered and received in evidence as Defendants' Exhibit 53 a table entitled "Table 1. Comparison of Average Hourly Earnings of 'Outside Laborers' at Bituminous Coal Mines with Average Hourly Entrance Rates Paid Common Labor in Other Industries."]

(1670) [There was offered and receive din evidence as Defendants' Exhibit 54 a table entitled "Computed Total

Annual Wage Payments Made by the Bituminous Coal Industry in 1923, 1929 and 1933."]

(1671) [There was offered and received in evidence as Defendants' Exhibit 55 a statement entitled "Number of Men Employed in Bituminous Coal Mines in 1931, in Specified Counties."]

(1671) [On motion of Mr. Critchlow, without objection by counsel for the plaintiff, the Court took judicial notice of the contents of the Annual Coal Reports, United States Bureau of Mines, formerly United States Geological Survey, for the years 1917 to 1933, as published in the Mineral Resources of the United States for those years.]

[fol. 784] (1666) [Counsel for the plaintiff in open court amended the bill of complaint by adding subparagraphs (5) and (6) to paragraph 17 of the bill of complaint, to which amendments the counsel for all of the defendants consented.]

(1942) [On motion of counsel for the plaintiff and consent of counsel for all of the defendants, paragraph 17 of the bill of complaint was further amended by adding subparagraphs (2a), (2b) and (2c) and paragraph 26 of the bill was amended by adding an additional clause at the end of the third sentence therein.]

[fol. 784a] STIPULATION

It was also stipulated that the Court and any appellate court might take judicial notice of the contents of the Congressional Hearings and Reports listed below:

[fol. 784b] List of Certain Congressional Hearings and Federal Investigations Relating to the Bituminous Coal Industry

1913. Conditions in Paint Creek, West Virginia:

Hearings before a subcommittee of Senate Committee on Education and Labor, 63d Congress, 1st Session, pursuant to S. Res. 37, authorizing investigation of Paint Creek District. 2298 pp. 2 maps.

1914. Conditions in the Coal Mines of Colorado:

Hearings before the subcommittee of the Committee on Mines and Mining, pursuant to H. Res. 387. A resolution

authorizing and directing the Committee on Mines and Mining to make an investigation of conditions in the coal mines of Colorado.

Report on the coal strike investigation made under H. R. 387, printed as House Document 1630, 63d Congress, 3d session.

1915:

Report of the U. S. Coal Commission on the labor difficulties in the coal fields in Colorado, during the years 1914 and 1915. Printed as House Document 859, 64th Cong., 1st Session.

1917. Price Regulation of Coal and Other Commodities:

Hearings before Committee on Interstate Commerce, United States Senate, 65th Cong., 1st Sess., on S. 2354, a bill to amend the Act to regulate commerce, and on S. J. Res. 77, to provide further for the national security and defense by regulating the production, sale and distribution of coal. 503 pp.

1918. Shortage of Coal:

Hearings before the subcommittee of Senate Committee on Manufactures, 65th Congress, 2d session, pursuant to S. Res. 163, directing the Committee to investigate causes of shortage of coal and sugar. Coal. 1788 pp., 3 vols.

1919. Increased Price of Coal:

Hearings before a subcommittee of Senate Committee on Interstate Commerce, 66th Cong., 1st Session, pursuant to S. Res. 126, Part 1. 483 pp.

S. Res. directed the Committee to make inquiry into causes which have brought about enormous increase in market price of coal and to report its findings with a view to congressional or executive action.

1920. U. S. Bituminous Coal Commission. Majority and Minority Reports to the President. 120 pp.:

(Commission was appointed by Executive communication, dated December 6, 1919.)

1920-1921. Coal and Transportation:

Hearings before the Select Committee on Reconstruction and Production, U. S. Senate, 66th Congress, 3d Session, pursuant to S. Res. 350. 2361 pp. 3 vols.

[fol. 784c] 1921. Publication of Production and Profits in Coal:

Hearings before Senate Committee on Manufactures, 66th Congress, 3rd Session, on S. 4828, a bill to promote the general welfare by gathering information respecting the ownership, production, distribution, costs, sales and profits in the coal industry and by publication of same, and to recognize and declare coal and its production and distribution charged with public interest and use. 2235 pp.

1921. The Coal Problem:

Hearings before a subcommittee of Senate Committee on Interstate Commerce, 67th Congress, 1st Session, on S. 41, to provide for reasonable rates for the transportation of coal; on S. 42, to provide for the appointment of a Federal Coal Commissioner; on S. 824, to provide for a Federal Coal Comissioner, and directing the Director of the Geological Survey to act as such commissioner. 43 pp.

1921. West Virginia Coal Fields:

Hearings before the Committee on Education and Labor of the Senate on Conditions in the West Virginia Coal Fields, 67th Congress, 1st session, pursuant to S. Res. 80, directing the Committee on Education and Labor to investigate the recent acts of violence in the coal fields of West Virginia and adjacent territory and the causes which led to the conditions which now exist in said territory.

1922. Investigation of Wages and Working Conditions in the Coal Mining Industry:

Hearings before House Committee on Labor, 67th Congress, 2d Session, on H. R. 11022, to establish a Commission to inquire into labor conditions in the coal industry. 561pp.

1923. Report of the United States Coal Commission:

Transmitted pursuant to the Act approved September 22, 1922. (Public No. 347.) 2719 pp., 4 vols. and Atlas. S. Doc. No. 195, 68th Congress, 2nd Session.

1926. Coal Legislation:

Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 69th Congress, 1st Session, on Coal Legislation.

1928. Conditions in the Coal Fields of Pennsylvania, West Virginia, and Ohio:

Hearings before the Committee on Interstate Commerce, U. S. Senate, 70th Congress, 1st Session, pursuant to S. Res. 105, a resolution to investigate conditions in the coal fields of Pennsylvania, West Virginia and Ohio.

1929. Bituminous Coal Commission:

Hearings before the Committee on Interstate Commerce, U. S. Senate, 70th Congress, 2nd Session, on S. 4490. A bill to regulate interstate and foreign commerce in bituminous coal, provide for consolidations, mergers, and cooperative marketing; regulate the fuel supply of interstate carriers; require the licensing of corporations producing and shipping coal in interstate commerce; and to create a bituminous coal commission, and for other purposes.

[fol. 784d] 1932. To Create a Bituminous Coal Commission:

Hearings before a subcommittee of the Committee on Mines and Mining, U. S. Senate, 72d Congress, 1st Session, on S. 2935, a bill to regulate interstate and foreign commerce in bituminous coal; provide for consolidations, mergers, and cooperative marketing; require the licensing of corporations producing and shipping coal in interstate commerce; and to create a bituminous coal commission, and for other purposes. 1351 pp., 2 vols.

1935. Stabilization of the Bituminous Coal Mining Industry:

Hearings before a subcommittee of the Committee on Interstate Commerce, U. S. Senate, 74th Congress, 1st ses-

sion, on S. 1417, a bill to stabilize the bituminous coal industry and promote its interstate commerce, etc. 624 pp.

1935. Stabilization of Bituminous Coal Mining Industry:

Hearings before a subcommittee of the Committee on Ways and Means, House of Representatives, 74th Congress, 1st Session, on H. R. 8479. 661 pp.

[fol. 785] STATEMENT OF EXCEPTIONS

(NOTE.—Figures in parentheses indicate pages in the original transcript of the evidence.)

The following exceptions to rulings made by the Court during the progress of the trial were duly taken, noted and allowed:

(210) The plaintiff took exception to the entry of so much of the order of injunction pendente lite against defendant Carter Coal Company and its officers, and order denying preliminary injunction against Guy T. Helvering, et al. (Tr. 207-209) as denied relief against defendants Guy T. Helvering, et al. and as directed the giving of a bond as a condition of the relief against the defendants Carter Coal Company, et al.

(400) Mr. Whitney moved to strike the following portion of Mr. Tryon's testimony:

"But the fact that there are 34 days of seasonal idleness that cannot be avoided does not make the loss of time any less serious to the worker or to the owner of the mine."

The objection was overruled. An exception was taken.

(401) Mr. Whitney objected to the following question by Mr. Critchlow to Mr. Tryon:

"Q. Mr. Tryon, what was the economic position of the mine workers during this pre-war period?"

as irrelevant. (407) The objection was overruled. An exception was taken.

(618) Mr. Whitney objected to testimony by Mr. O'Neill as to the wages paid by his company and moved to strike

out previous testimony of Mr. O'Neill with respect to wages on the ground that the witness stated that there was more representative evidence. The objection and motion were overruled. An exception was noted.

(857) Mr. Lewin objected to the following question by Mr. Whitney to Mr. Findlay on cross examination as calling [fol. 786] for a legal conclusion:

"Q. Now, Mr. Findlay, as an expert on the coal industry, what provisions do you find in this statute which in your opinion will have the effect of tending to enforce the statute against those who otherwise will break it?"

The objection was overruled. An exception was noted.

(868) Mr. Lewin objected to the following question by Mr. Whitney to Mr. Findlay on cross examination as calling for a legal conclusion:

"Q. Well, that brings us back to this tax. Was there a similar tax in respect of the old code?

"A. No."

The objection was overruled. An exception was noted.

(869) Mr. Lewin objected to the following question by Mr. Whitney to Mr. Findlay:

"Q. Mr. Findlay, can you think of any other provision in the new code that differs from the old code?"

The objection was overruled. An exception was noted.

(918) Mr. Whitney objected to the following question by Mr. Critchlow to Mr. Reed as a question of law for the Court:

"Q. Do you regard wage cutting as an unfair method of competition?"

The objection was overruled. An exception was taken.

(944-945) Mr. Whitney objected to the following question by Mr. Critchlow to Mr. Mahan on the ground that the witness did not know what the industry generally would do:

"Q. And would pay it if there was a stabilized price which would enable them to do so?"

which followed after the question and answer:

"Q. The industry generally, universally, or generally wants to pay a fair wage, does it not?

"A. That is absolutely true."

The objection was overruled. An exception was taken.

(995-996) Mr. Whitney moved that examples in the case be confined throughout the evidence to representative or average examples. The motion was denied. An exception was taken.

(1002) Mr. Whitney moved to strike out testimony by Mr. Murray to the effect that employees were denied the right to assemble for any purpose that might have had to do with [fol. 787] their civic or social betterment, as not responsive. The motion was overruled and an exception was noted.

(1002-1003) Mr. Whitney objected to the following question by Mr. Lewin to Mr. Murray as having nothing to do with the case:

"Q. Mr. Murray, when you say they were isolated there, and that there was colonization, will you just describe that a little more fully?"

The objection was overruled. An exception was taken.

(1071) Mr. Whitney moved to strike out the testimony of Mr. Murray as to leases and evictions as hearsay, not the best evidence, incompetent, and introduced for the purpose of prejudice. (1075) The objection was overruled. An exception was taken.

(1129-1130) Mr. Whitney objected to the admission of Defendants' Exhibit No. 27 as entirely collateral. The objection was overruled. An exception was noted.

(1221-1222) Mr. Whitney objected to the following question by Mr. Lewin to Mr. Lubin:

"Q. Briefly, in your opinion, what are the chief steps which should be taken in the industry to alleviate those conditions?"

The objection was overruled. An exception was noted.

(1228) Mr. Whitney objected to the following question by Mr. Lewin to Mr. Lubin:

"Q. Will you state your reasons for your belief?"

as being outside the issues in the case. The objection was overruled. An exception was taken.

(1232-1233) Mr. Whitney objected to Mr. Lewin's questioning Mr. Lubin as to his opinion as to the effect of fixing

minimum prices. The objection was overruled. An exception was taken.

[fol. 788] (1270) Mr. Whitney objected to the following question by Mr. Lewin to Miss Roche on the ground of its being outside the issues in the case:

"Q. What effect upon the union did this strike of 1913 to 1915 have?"

The objection was overruled. An exception was taken.

(1270-1271) Mr. Whitney objected to the following question by Mr. Lewin to Miss Roche on the ground that there is nothing in the statute bearing upon or preventing combinations:

"Q. Was there any combination among the coal operators to oppose the bringing-about of better labor conditions?"

The objection was overruled. An exception was taken.

(1273-1274) Mr. Whitney objected to the following testimony by Miss Roche as immaterial:

"The men did not have a checkweighman at any of our mines but one, and that particular checkweighman had been elected at a meeting at the mine tipple under the supervision of the mine superintendent. He was in no sense representative of the miners. He was one of the industrial spies that had been maintained in the company for years—"

The objection was overruled. An exception was taken.

(1274-1275) Mr. Whitney objected to the following testimony by Miss Roche as being outside the issues in the case:

"The Witness: One of the further causes of great unrest and dissatisfaction was the employment by the company of industrial spies. We maintained at that time the head of a former detective agency—"

The Court overruled the objection after the following colloquy:

"The Court: Does she testify that these conditions existed in other companies?"

"Mr. Lewin: Yes.

"By Mr. Lewin:

[fol. 789] "Q. Am I correct in that, Miss Roche?

"A. Our company was typical of the industry."

An exception was taken.

(1284-1285) Mr. Whitney objected to the offer in evidence of Defendants' Exhibit No. 39, a copy of an agreement between Rocky Mountain Fuel Company of Colorado and the United Mine Workers of America, on the ground of immateriality. The objection was overruled. An exception was taken.

(1290-1291) Mr. Whitney objected to the following question (underlined) by Mr. Lewin to Miss Roche:

"Q. From your knowledge and experience in the industry, do you believe a stabilization of prices necessary or desirable?

"A. I believe it is necessary and desirable, in the interest of all three parties, the industry, the public, and the workers.

"*Q. Will you tell us your reasons for believing that?*"

on the ground of irrelevancy. The objection was overruled. An exception was taken.

(1292) Mr. Whitney objected on the ground of irrelevancy and immateriality to the following question by Mr. Lewin to Miss Roche:

"Q. To what extent, if any, have conditions in the industry which prevailed prior to 1933 in your State brought about waste in coal resources?"

The objection was overruled. An exception was taken.

(1519-1520) Mr. Whitney objected to the admission of Defendants' Exhibit No. 41 on the ground of irrelevancy and immateriality. The objection was overruled. An exception was noted.

(1548-1551) Mr. Whitney objected to the admission in [fol. 790] evidence of Defendants' Exhibits Nos. 42, 43, 43A, 43B and 43C on the ground of irrelevancy. The objections were overruled. Exceptions were taken.

(1554-1559) Mr. Whitney objected to the request of Mr. Critchlow from Mr. Carter of information relative to realization and costs of Carter Coal Company by months since January 1, 1935. The objection was sustained. An exception was noted.

(1568) Mr. Critchlow objected to the introduction in evidence of Plaintiff's Exhibits Nos. 70, 70A and 70B on the ground of immateriality. The objection was overruled. An exception was taken.

(1589-1592) Mr. Critchlow objected to the admission in evidence of Plaintiff's Exhibits Nos. 84 and 85 on the ground of immateriality and irrelevancy. The objection was sustained. An exception was taken.

(1615-1616) Mr. Critchlow objected to the admission of Plaintiff's Exhibit No. 87 as immaterial. The objection was overruled. An exception was taken.

[fol. 791] **Exhibits**

Be it further remembered that at the hearing of the above-entitled cause before Mr. Justice Adkins, the following exhibits were offered and received in evidence:

[fol. 792] PLAINTIFF'S EXHIBIT 1

Certificate of Incorporation of Carter Coal Company

First. The name of this corporation is Carter Coal Company.

Second. The location of its principal office in the State of Delaware is in the City of Wilmington, County of New Castle. The name of the agent therein and in charge thereof is Delaware Trust Company.

Third. The objects and purposes for which and for any of which this Corporation is formed, are, to do any or all of the things herein set forth to the same extent as natural persons might or could do, viz: To buy, lease, hold, sell, encumber, mortgage and otherwise acquire, enjoy and dispose of lands and interests in lands, within the State of Delaware, or any other States, Districts, Territories or Colonies of the United States, and in any and all foreign countries, subject to the laws of such State, District, Territory, Colony or Country; and within the State of Delaware, and in any and all other States, Districts, Territories or Colonies of the United States, and in any and all foreign Countries, subject to the laws of such State, District, Territory, Colony or Country, to lease, construct, and otherwise acquire, enjoy and dispose of storehouses, warerooms and all other buildings; to buy and sell all kinds of merchandise; to mine, quarry and prepare for market, and buy and sell or otherwise acquire and dispose of coal, iron, rock,

stone, clay and all minerals, metals and timber; to manufacture, sell and otherwise dispose of all articles made from coal, minerals, metals, wood, clay, stone, rock and other substances; and to operate plants of all kinds for the manu- [fol. 793] facture or preparation of such articles; to conduct a general farming business and buy, sell and deal in farm products and live stock of all kinds; to purchase, hold, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created by, any other incorporation or corporations of the State of Delaware, or any other State, District, Territory or Colony of the United States, or of any foreign country, and while owner of such stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon; to purchase, hold and re-issue the shares of its capital stock.

Fourth. The enumeration of the foregoing specific objects and powers shall not be held to limit or restrict in any manner the objects and powers of this Corporation, but the Corporation shall have all the powers conferred upon it by the laws of Delaware to do any and all things permitted to Corporations organized under the Act hereinafter referred to whether hereinbefore enumerated or not.

Fifth. The total authorized capital stock of this Corporation is five million ($5,000,000.00) divided into fifty thousand shares of the par value of one hundred dollars each.

Sixth. The amount of capital stock with which the Corporation will commence business is Fifteen Hundred dollars, being Fifteen shares of one hundred dollars each.

Seventh. The names and places of residence of each of the original subscribers to the capital stock and the number of shares subscribed for by each, are as follows:

Geo. L. Carter, Johnson City, Tennessee—3 Shares.
[fol. 794] S. R. Jennings, Johnson City, Tennessee—3 Shares.
J. C. Stone, Johnson City, Tennessee—3 Shares.
W. B. Kegley, Wytheville, Virginia—3 Shares.
Harry W. Davis, Wilmington, Delaware—3 Shares.

Eighth. This Corporation is to have perpetual succession.

Ninth. The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

Tenth. In furtherance, and not in limitation of the powers conferred by statute, the Board of Directors are expressly authorized to make, alter, amend and rescind the By-Laws of this Corporation.

We, the undersigned, being each of the original subscribers to the capital stock hereinbefore named, for the purpose of forming a Corporation to do business both within and without the State of Delaware, and in pursuance of an Act of the Legislature of the State of Delaware entitled "An Act Providing a General Corporation Law" (approved March 10th, 1899) and the acts amendatory thereof and supplemental thereto, do make and file this certificate, hereby declaring and certifying that the facts herein stated are true, and do respectively agree to take the number of shares of stock hereinbefore set forth; and accordingly have hereunto set our hands and seals, this seventeenth day of December, A. D. 1912.

Geo. L. Carter. (Seal.) S. R. Jennings. (Seal.)
J. C. Stone. (Seal.) W. B Kegley. (Seal.)
Harry W. Davis. (Seal.)

In Presence of: William W. Pusey, 2d, as to G. L. C. William W. Pusey, 2d, as to S. R. J. T. F. Davis. T. F. Davis. William W. Pusey, 2d, as to H. W. D.

[fol. 795] STATE OF TENNESSEE,
County of Washington, ss:

Be it remembered, that on this seventeenth day of December, A. D. 1912, personally appeared before me, T. F. Davis, a Notary Public for the State of Tennessee, J. C. Stone and W. B. Kegley, parties to the foregoing Certificate of Incorporation, known to me personally to be such, and severally acknowledged the said Certificate to be the act and deed of the signers respectively and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

T. F. Davis, Notary Public.

T. F. Davis, Washington County, Tennessee, Notary Public.

My Commission Expires July 12, 1915.

[fol. 796] STATE OF DELAWARE,
County of New Castle, ss:

Be it remembered, that on this 18th day of December, A. D. 1912, personally came before me, William W. Pusey 2d, a Notary Public for the State of Delaware, George L. Carter, S. R. Jennings and Harry W. Davis, parties to the foregoing Certificate of Incorporation, known to me personally to be such, and severally acknowledged the said Certificate to be the act and deed of the signers respectively and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

William W. Pusey, 2d, Notary Public.

William W. Pusey, 2d, Notary Public, State of Delaware. Appointed Mch. 19, 1912, term four years.

(Here follows photolithograph, side folio 797.)

State of Delaware

Office of Secretary of State.

I, J. Walter Dent Smith, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Incorporation of the "CARTER COAL COMPANY", as received and filed in this office the eighteentn day of December, A. D. 1912, at 5 o'clock P.M.

In Testimony Whereof, I have hereunto set my hand and official seal at Dover this seventeenth day of October in the year of our Lord one thousand nine hundred and thirty-five.

Walter Dent Smith

Secretary of State

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[fol. 798] PLAINTIFF'S EXHIBIT 2

Carter Coal Company

Certificate of Amendment of Certificate of Incorporation

Carter Coal Company, a corporation organized and existing under an Act of the Legislature of the State of Delaware, entitled "An Act providing a General Corporation Law", approved March 10, 1899, and the Acts amendatory thereof and supplemental thereto, the Certificate of Incorporation of which Corporation was duly filed in the office of the Secretary of the State of Delaware on December 18, 1912, desiring to amend its said charter or Certificate of Incorporation, does hereby certify as follows:

I. That at a meeting of the Board of Directors of the said Corporation, duly held on February 6, 1922, the following Resolutions were duly adopted:

"Resolved, that it is advisable that the Certificate of Incorporation of this Corporation be amended, so that Article Fifth thereof shall read as follows:

'Fifth: The authorized capital stock of the Corporation shall consist of forty thousand (40,000) shares of Preferred Stock, of the par value of $100, each, amounting in the aggregate to Four Million Dollars ($4,000,000), par value, and fifty thousand (50,000) shares of Common Stock, without nominal or par value.

'The Preferred Stock shall be entitled to receive, out of surplus or net profits, dividends cumulative from and after February 1, 1923, at the rate of six per cent per annum, payable quarterly on the first day of each of the months of February, May, August and November in each year. No dividends shall be declared or paid upon any of [fol. 799] the Common Stock, so long as any of the Preferred Stock is outstanding, unless prior thereto or simultaneously therewith provision shall be made for the retirement of all the Preferred Stock then outstanding.

'On any liquidation, dissolution or distribution of capital assets (whether voluntary or involuntary), the Preferred Stock shall be entitled to receive an amount equivalent to the par value thereof and the amount of any accumulated and unpaid dividends thereon, with interest on overdue instalments of dividends at the rate of six per cent. per

annum from the respective dates upon which the same should have been paid, as hereinbefore provided. After distribution shall have been made to the Preferred Stock, as herein provided, but not prior thereto, the Common Stock of the Corporation shall be entitled to receive all the remainder of the assets of the Corporation.

'The Corporation will have the right to redeem the Preferred Stock on any quarterly dividend date, in whole or in such portions as, from time to time, the Board of Directors may determine, upon the payment of an amount equivalent to the par value thereof and the amount of any unpaid dividends accumulated thereon, with interest on overdue instalments of dividends at the rate of six per cent. per annum from the respective dates upon which the same should have been paid, as hereinbefore provided. If less than the whole amount of outstanding Preferred Stock shall be so redeemed at any time, the stock to be redeemed shall be selected in such manner as the Board of Directors may by Resolution determine. At least thirty days' notice in advance of such redemption shall be mailed to each holder of Preferred Stock to be redeemed at his address registered with the Corporation, and, if less than all the shares owned by such holder is to be redeemed, the notice shall specify the number of such shares to be redeemed. On and after the date fixed for such redemption, unless the Corporation shall not, after proper demand, have paid [fol. 800] to the respective holders of the shares so called for redemption the redemption price thereof, the stock so called for redemption shall cease to be entitled to any dividends and the respective holders thereof shall have no other right or interest therein or in the Corporation or in the assets thereof, by reason of the ownership of such shares, except to receive payment therefor at the said redemption price, upon presentation and surrender of their respective certificates therefor.

'So long as any of the Preferred Stock is outstanding, the Corporation shall not, without the written consent or affirmative vote of at least seventy-five per cent. of the outstanding Preferred Stock, execute any mortgage upon any of its assets at any time, or cause or suffer any lien in the nature of a mortgage to be placed thereon, to secure indebtedness in excess of the aggregate principal amount of Twelve Million Dollars ($12,000,000) and interest; and,

without the written consent or affirmative vote of at least seventy-five per cent. of the outstanding Preferred Stock, the authorized amount of Preferred Stock of the Corporation shall at no time be increased.

'So long as the Corporation shall not be in default, as hereinafter provided, the Preferred Stock shall have no right to vote for any purpose or on any subject at, or to receive notice of, any meeting of stockholders, except as otherwise expressly provided by law. If, however, the Corporation shall at any time be in default in the payment of any four quarterly dividends on the Preferred Stock, thereafter, the Preferred Stock shall have the right to receive notice of all meetings of stockholders and, at any such meeting, the Preferred Stock, shall for any and all purposes, have voting rights equal to the Common Stock in respect of number of votes cast for each share, and such rights shall continue in the Preferred Stock until all [fol. 801] unpaid accumulated dividends shall have been declared and paid, and thereupon the Preferred Stock shall cease to have voting rights, except as expressly provided by law, or until the Corporation shall again be in default in the payment of four quarterly dividends.

'Anything herein contained to the contrary notwithstanding, in case the Corporation shall at any time be in default in the payment of any quarterly dividend or dividends on any of the Preferred Stock, such Preferred Stock shall be entitled to receive, upon the payment of and in addition to the quarterly dividend or dividends so in default, a further dividend payable out of surplus or net profits in an amount equivalent to interest on the amount of such quarterly dividend or dividends at the rate of six per cent. per annum for the period during which such default shall have continued.

'*Any* any meeting of stockholders, each share of stock entitled to vote thereat shall be entitled to one vote.

'The Preferred Stock shall have no preemptive right in or right to subscribe for any additional stock of whatever class which may at any time be issued by the Corporation. The Common Stock shall have no preemptive right in or right to subscribe for any additional Preferred Stock which may at any time be issued by the Corporation; but the holders of Common Stock, in proportion to their respective holdings, shall be entitled to subscribe for and

purchase any additional Common Stock or securities convertible into Common Stock which may, from time to time, be issued by the Corporation for cash.'

"Resolved, that a Special Meeting of the stockholders of this Corporation be called, to be held at the office of the Corporation on February 6, 1922, at eleven o'clock, A. M., for the purpose of considering and taking action upon the said proposed amendment, and for the purpose of taking action upon and of transacting such other and further [fol. 802] matters incidental to the foregoing, including the approving or authorizing of any action of the Board of Directors in relation thereto, as may be brought before the meeting.

"Resolved, that Charles R. Barrett and Everett W. Barto be and are hereby appointed judges to act at the said meeting."

II. That thereafter, pursuant to the said Resolutions of the Board of Directors, a Special Meeting of the stockholders of the said Corporation was duly called and held at the office of the Corporation, in accordance with the law, and upon such notice as the By-laws of the said Corporation provided, on February 6, 1922, at eleven o'clock, A. M.

III. That, at the said Special Meeting, the vote of the stockholders entitled to vote, by ballot, in person or by proxy, was taken for and against the said proposed amendment, which vote was conducted by Charles R. Barrett and Everett W. Barto, the two judges appointed for that purpose by the Board of Directors, as aforesaid, and that, by vote conducted as aforesaid, the persons holding the majority of the stock of the Corporation entitled to vote (there being but one class of stock outstanding) voted in favor of the said amendment, all as appears by the duplicate Certificates made out by the said Judges, one of which is hereto attached, marked "Exhibit A".

In witness whereof, the Carter Coal Company has made this Certificate under its corporate seal and the hands of its President and Secretary.

Carter Coal Company, by S. D. Camden, President; H. H. Warfield, Secretary. (Carter Coal Company, Incorporated, Seal, 1912.)

[fol. 803] STATE OF NEW YORK,
County of New York:

Be it remembered, that on the 25th day of September, 1922, personally came before me, Charles R. Chatterton, a Notary Public in and for the County and State aforesaid, S. D. Camden and H. H. Warfield, President and Secretary, respectively, of the Carter Coal Company, a corporation of the State of Delaware, the corporation described in and which executed the foregoing Certificate, known to me personally to be such, and severally executed the said Certificate before me; and the said S. E. Camden duly acknowledged the said Certificate to be his act and deed as such President, and the act and deed of said Corporation, and that the seal affixed to said Certificate is the corporate seal of the said Corporation, and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

Charles R. Chatterton, Notary Public.

New York County No. 461. New York County Registrars No. 3394.

My Commission expires March 30, 1923.

Charles R. Chatterton, Notary Public, New York County.

[fol. 804] Carter Coal Company

Judges' Certificate

We, the undersigned, Charles R. Barrett and Everett W. Barto, do hereby certify that we were duly appointed by the Board of Directors of the Carter Coal Company to act as Judges for the purpose of conducting the vote of the stockholders of the said Corporation at the Special Meeting thereof held on February 6, 1922, to consider the proposition of amending the Charter or Certificate of Incorporation of the said Corporation, so that Article Fifth thereof should read as follows:

"Fifth. The authorized capital stock of the Corporation shall consist of forty thousand (40,000) shares of Preferred Stock, of the par value of $100 each, amounting in the aggregate to Four Million Dollars ($4,000,000), par value, and fifty thousand (50,000) shares of Common Stock, without nominal or par value.

"The Preferred Stock shall be entitled to receive, out of surplus or net profits, dividends cumulative from and after February 1, 1923, at the rate of six per cent. per annum, payable quarterly on the first day of each of the months of February, May, August and November in each year. No dividends shall be declared or paid upon any of the Common Stock, so long as any of the Preferred Stock is outstanding, unless prior thereto or simultaneously therewith provision shall be made for the retirement of all the Preferred Stock then outstanding.

"On any liquidation, dissolution or distribution of capital assets (whether voluntary or involuntary), the Preferred Stock shall be entitled to receive an amount equivalent to the par value thereof and the amount of any accumulated and unpaid dividends thereon, with interest on overdue instalments of dividends at the rate of six per cent. per [fol. 805] annum from the respective dates upon which the same should have been paid, as hereinbefore provided. After distribution shall have been made to the Preferred Stock, as herein provided, but not prior thereto, the Common Stock of the Corporation shall be entitled to receive all the remainder of the assets of the Corporation.

"The Corporation will have the right to redeem the Preferred Stock on any quarterly dividend date, in whole or in such portions as, from time to time, the Board of Directors may determine, upon the payment of an amount equivalent to the par value thereof and the amount of any unpaid dividends accumulated thereon, with interest on overdue instalments of dividends at the rate of six per cent. per annum from the respective dates upon which the same should have been paid, as hereinbefore provided. If less than the whole amount of outstanding Preferred Stock shall be so redeemed at any time, the stock to be redeemed shall be selected in such manner as the Board of Directors may by Resolution determine. At least thirty days' notice in advance of such redemption shall be mailed to each holder of Preferred Stock to be redeemed at his address registered with the Corporation, and, if less than all the shares owned by such holder is to be redeemed, the notice shall specify the number of such shares to be redeemed. On and after the date fixed for such redemption, unless the Corporation shall not, after proper demand, have paid to the respective holders of the shares so called for redemption the redemp-

tion price thereof, the stock so called for redemption shall cease to be entitled to any dividends and the respective holders thereof shall have no other right or interest therein or in the Corporation or in the assets thereof, by reason of the ownership of such shares, except to receive payment therefor at the said redemption price, upon presentation and surrender of their respective certificates therefor.

[fol. 806] "So long as any of the Preferred Stock is outstanding, the Corporation shall not, without the written consent or affirmative vote of at least seventy-five per cent. of the outstanding Preferred Stock, execute any mortgage upon any of its assets at any time, or cause or suffer any lien in the nature of a mortgage to be placed thereon, to secure indebtedness in excess of the aggregate principal amount of Twelve Million Dollars ($12,000,000) and interest; and, without the written consent or affirmative vote of at least seventy-five per cent. of the outstanding Preferred Stock, the authorized amount of Preferred Stock of the Corporation shall at no time be increased.

"So long as the Corporation shall not be in default, as hereinafter provided, the Preferred Stock shall have no right to vote for any purpose or on any subject at, or to receive notice of, any meeting of stockholders, except as otherwise expressly provided by law. If, however, the Corporation shall at any time be in default in the payment of any four quarterly dividends on the Preferred Stock, thereafter the Preferred Stock shall have the right to receive notice of all meetings of stockholders and, at any such meeting, the Preferred Stock, shall for any and all purposes, have voting rights equal to the Common Stock in respect of number of votes cast for each share, and such rights shall continue in the Preferred Stock until all unpaid accumulated dividends shall have been declared and paid, and thereupon the Preferred Stock shall cease to have voting rights, except as expressly provided by law, or until the Corporation shall again be in default in the payment of four quarterly dividends.

"Anything herein contained to the contrary notwithstanding, in case the Corporation shall at any time be in default in the payment of any quarterly dividend or divi-
[fol. 807] dends on any of the Preferred Stock, such Preferred Stock shall be entitled to receive, upon the payment of and in addition to the quarterly dividend or dividends so in default, a further dividend payable out of surplus

or net profits in an amount equivalent to interest on the amount of such quarterly dividend or dividends at the rate of six per cent. per annum for the period during which such default shall have continued.

"At any meeting of stockholders, each share of stock entitled to vote thereat shall be entitled to one vote.

"The Preferred Stock shall have no preemptive right in or right to subscribe for any additional stock of whatever class which may at any time be issued by the Corporation. The Common Stock shall have no preemptive right in or right to subscribe for any additional Preferred Stock which may at any time be issued by the Corporation; but the holders of Common Stock, in proportion to their respective holdings, shall be entitled to subscribe for and purchase any additional Common Stock or securities convertible into Common Stock which may, from time to time, be issued by the Corporation for cash."

That, at the said Special Meeting, the vote of the stockholders entitled to vote, by ballot, in person or by proxy, was taken for and against the said proposed amendment; that the said vote was conducted by the undersigned, as Judges appointed for that purpose, as aforesaid; that, as such Judges, we decided upon the qualifications of voters at the said meeting and accepted their votes, and that, when the said vote was completed, we counted and ascertained the number of shares voted respectively for and against the said amendment, and we declared, and do hereby declare, that the persons holding the majority of the voting stock of the said Corporation (there being but one class of stock outstanding) voted for and in favor of the said amendment. [fol. 808] And we further certify as follows:

I. The number of shares of stock, issued and outstanding entitled to vote at the said meeting, was fifty thousand (50,000).

II. The number of shares voted for the said amendment was fifty thousand (50,000).

III. The number of shares voted against the said amendment was none.

In witness whereof, we have made out the foregoing Certificate, in duplicate, and subscribed our names hereto, this 6th day of February, 1922.

Everett Wheeler Barto, Charles R. Barrett, Judges.

(Here follows 1 photo, folio 809.)

600A

State of Delaware

Office of Secretary of State.

I, Walter Dent Smith, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Amendment of Certificate of Incorporation of the "CARTER COAL COMPANY", as received and filed in this office the twenty-eighth day of September, A. D. 1922, at 1 o'clock P.M.

In Testimony Whereof, I have hereunto set my hand and official seal at Dover this seventeenth day of October in the year of our Lord one thousand nine hundred and thirty-five.

Walter Dent Smith

Secretary of State

809

[fol. 810] PLAINTIFF'S EXHIBIT 3

Certificate of Amendment of Certificate of Incorporation of Carter Coal Company

Pursuant to Section 26 of the General Corporation Law of the State of Delaware

We, the undersigned, W. W. Stevenson, President, and C. E. Beachley, Secretary, of Carter Coal Company, a Delaware corporation (hereinafter called the Corporation), hereby make this Certificate under the corporate seal of the Corporation and do hereby certify as follows:

1. The Certificate of Incorporation (as amended) of the Corporation shall be amended so that Article Fifth thereof shall read as follows:

"Fifth. The total number of shares of all classes of stock which the Corporation shall have authority to issue is Eighty thousand (80,000), of which Forty thousand (40,000) shares, each of the par value of $100, shall be Preferred Stock, Thirty thousand (30,000) shares, each of the par value of $1, shall be Class A Common Stock, and Ten thousand (10,000) shares, each of the par value of $1, shall be Class B Common Stock.

"A statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, of all classes of stock of the Corporation is as follows:

"The Preferred Stock shall be entitled to receive, out of surplus or net profits, dividends cumulative from and after February 1, 1923, at the rate of six per cent. per annum, payable quarterly on the first day of each of the months of [fol. 811] February, May, August and November in each year. No dividends shall be declared or paid upon any of the Class A Common Stock or the Class B Common Stock, so long as any of the Preferred Stock is outstanding, unless prior thereto or simultaneously therewith, provision shall be made for the retirement of all the Preferred Stock then outstanding.

"On any liquidation, dissolution or distribution of capital assets (whether voluntary or involuntary), the Preferred Stock shall be entitled to receive an amount equiva-

lent to the par value thereof and the amount of any accumulated and unpaid dividends thereon, with interest on overdue instalments of dividends at the rate of six per cent. per annum from the respective dates upon which the same should have been paid, as hereinbefore provided. After distribution shall have been made to the Preferred Stock, as herein provided, but not prior thereto, the Class A Common Stock and the Class B Common Stock of the Corporation shall be entitled to receive, ratably, all the remainder of the assets of the Corporation.

"The Corporation will have the right to redeem the Preferred Stock on any quarterly dividend date, in whole or in such portions as, from time to time, the Board of Directors may determine, upon the payment of an amount equivalent to the par value thereof and the amount of any unpaid dividends accumulated thereon, with interest on overdue instalments of dividends at the rate of six per cent. per annum from the respective dates upon which the same should have been paid, as hereinbefore provided. If less than the whole amount of outstanding Preferred Stock shall be so redeemed at any time, the stock to be redeemed shall be selected in such manner as the Board of Directors may by [fol. 812] resolution determine. At least thirty days' notice in advance of such redemption shall be mailed to each holder of Preferred Stock to be redeemed at his address registered with the Corporation, and, if less than all the shares owned by such holder is to be redeemed, the notice shall specify the number of such shares to be redeemed. On and after the date fixed for such redemption, unless the Corporation shall not, after proper demand, have paid to the respective holders of the shares so called for redemption the redemption price thereof, the stock so called for redemption shall cease to be entitled to any dividends and the respective holders thereof shall have no other right or interest therein or in the Corporation or in the assets thereof, by reason of the ownership of such shares, except to receive payment therefor at the said redemption price, upon presentation and surrender of their respective certificates therefor.

"So long as any of the Preferred Stock is outstanding, the Corporation shall not, without the written consent or affirmative vote of at least seventy-five per cent. of the outstanding Preferred Stock, execute any mortgage upon any

of its assets at any time, or cause or suffer any lien in the nature of a mortgage to be placed thereon, to secure indebtedness in excess of the aggregate principal amount of Twelve Million Dollars ($12,000,000) and interest; and, without the written consent or affirmative vote of at least seventy-five per cent. of the outstanding Preferred Stock, the authorized amount of Preferred Stock of the Corporation shall at no time be increased.

"So long as the Corporation shall not be in default, as hereinafter provided, the Preferred Stock shall have no right to vote for any purpose or on any subject at, or to [fol. 813] receive notice of, any meeting of stockholders, except as otherwise expressly provided by law. If, however, the Corporation shall at any time be in default in the payment of any four quarterly dividends on the Preferred Stock, thereafter, the Preferred Stock shall have the right to receive notice of all meetings of stockholders and, at any such meeting, the Preferred Stock shall for any and all purposes, have voting rights equal to the Class A Common Stock in respect of number of votes cast for each share, and such rights shall continue in the Preferred Stock until all unpaid accumulated dividends shall have been declared and paid, and thereupon the Preferred Stock shall cease to have voting rights, except as expressly provided by law, or until the Corporation shall again be in default in the payment of four quarterly dividends.

"Anything herein contained to the contrary notwithstanding, in case the Corporation shall at any time be in default in the payment of any quarterly dividend or dividends on any of the Preferred Stock, such Preferred Stock shall be entitled to receive, upon the payment of and in addition to the quarterly dividend or dividends so in default, a further dividend payable out of surplus or net profits in an amount equivalent to interest on the amount of such quarterly dividend or dividends at the rate of six per cent. per annum for the period during which such default shall have continued.

"Except as otherwise expressly required by the laws of the State of Delaware and as hereinbefore provided with respect to the Preferred Stock, neither the holders of Preferred Stock nor the holders of Class B Common Stock shall possess any voting power, and the holders of Class A Common Stock shall exclusively possess voting power for

[fol. 814] the election of directors and for all other purposes. The amount of the authorized stock of any class or classes of stock of the Corporation may be increased or decreased by the affirmative vote of the holders of a majority of the Class A Common Stock at such times as the holders of the Class A Common Stock have exclusive voting power as hereinabove provided, and by the affirmative vote of the holders of a majority of the Class A Common Stock and Preferred Stock, at such times as the holders of Preferred Stock, also possess voting power as herein above provided. At any meeting of stockholders, each share of stock entitled to vote thereat shall be entitled to one vote.

"Unless otherwise determined by the Board of Directors, no holder of stock of the Corporation of any class or classes, now or hereafter authorized, or of any obligation of the Corporation that shall be convertible into, or exchangeable for, any share or shares of such stock, or of any warrant, option or other instrument that shall confer on the holder thereof the right to subscribe for or purchase or receive from the Corporation any share or shares of such stock, shall, as such holder, have any right to purchase or subscribe for (a) any stock of any class or classes, now or hereafter authorized, or any warrant or warrants, option or options or other instrument or instruments that shall confer upon the holder or holders thereof the right to subscribe for, or purchase or receive from, the Corporation any stock of any class or classes, now or hereafter authorized, which the Corporation may issue or sell, whether or not such stock shall be exchangeable for any stock of the Corporation of any class or classes, now or hereafter authorized, and whether or not such stock shall be out of the number of shares thereof authorized by this Certificate [fol. 815] of Incorporation as originally filed, or by any amendment thereof, or out of shares of its stock acquired by it after the issue thereof; or (b) any obligation which the Corporation may issue or sell that shall be convertible into, or exchangeable for, any shares of the stock of the Corporation of any class or classes now or hereafter authorized, or to which shall be attached or appurtenant any warrant or warrants, option or options, or other instrument or instruments that shall confer upon the holder or holders of such obligation, warrant or warrants, option or options, or other instrument or instruments, the right

to subscribe for or purchase or receive from the Corporation any shares of its stock of any class or classes, now or hereafter authorized, provided, however, that if the right to purchase or subscribe for common stock of any class (whether or not having voting power) shall be offered by the Corporation to the holders of Class A Common Stock, there shall be offered to the holders of Class B Common Stock, at the same price per share, the right to purchase or subscribe for a proportionate number of shares of common stock without voting power."

2. Of said Ten thousand (10,000) shares of Class B Common Stock of the par value of $1 each, one (1) share is to be issued in exchange for every five (5) shares of Common Stock without par value outstanding at the date of the taking effect of this Amendment to the Certificate of Incorporation of the Corporation, and every five (5) shares of Common Stock without par value then outstanding shall, by the taking effect of this amendment, be changed into one (1) share of Class B Common Stock of the par value of $1 each. The aggregate amount of the capital of the Corporation represented by such shares of Class B Common Stock of the par value of $1 each shall be the same as the aggre- [fol. 816] gate amount of capital represented by the shares of Common Stock without par value so changed. The capital of the Corporation will not be reduced under or by reason of this Amendment.

3. The foregoing amendment has been duly adopted in accordance with the provisions of Section 26 of the General Corporation Law of the State of Delaware.

In witness whereof, we have signed this Certificate and caused the corporate seal of the Corporation to be affixed hereto, this 14th day of March, 1933.

W. W. Stevenson, President. C. E. Beachley, Secretary. (Carter Coal Company, Incorporated, Seal, 1912.)

Attest: C. E. Beachley, Secretary.

[fol. 817] State of New York,
County of New York, ss:

Be it remembered, that on the 14th day of March, 1933, personally came before me Elon A. Williams, a notary pub-

lic in and for the County and State aforesaid, W. W. Stevenson, President of Carter Coal Company, a Delaware corporation, the corporation described in and on behalf of which was made the foregoing Certificate, known to me to be such, and that said W. W. Stevenson, as such President, duly signed said Certificate before me and acknowledged said Certificate to be his act and deed and the act and deed of said Corporation; that the signatures of said President and of the Secretary of said Corporation to said foregoing Certificate are in the handwriting of said President and said Secretary of said Corporation, respectively, and that the seal affixed to said Certificate is the corporate seal of said Corporation, and that the act of sealing, executing, acknowledging and delivering said Certificate was duly authorized by the Board of Directors and by the stockholders of said Corporation.

Given under my hand and seal of office the day and year last aforesaid.

Elon A. Williams, Notary Public.

Notary Public, Kings Co. No. 37, Reg. No. 4035. Cert. filed in N. Y. Co. No. 66, Reg. No. 4-W-43.

My commission expires March 30th, 1934.

Elon A. Williams, Kings County Notary Public.

(Here follows 1 photo, folio 818.)

606A

State of Delaware

Office of Secretary of State.

I, Walter Dent Smith, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Amendment of the "CARTER COAL COMPANY", as received and filed in this office the fifteenth day of March, A. D. 1933, at 9 o'clock A.M.

In Testimony Whereof, I have hereunto set my hand and official seal at Dover this seventeenth day of October in the year of our Lord one thousand nine hundred and thirty-five.

Walter Dent Smith

Secretary of State.

[fol. 819] PL'FF'S EX. #4

Carter Coal Company

The undersigned, C. A. Hall, hereby certifies that he is Secretary of Carter Coal Company, a Delaware corporation, and that the copy of By-laws attached hereto is a true and correct copy of the By-laws of said Corporation, with all amendments and modifications to the date hereof.

Dated, October 21, 1935.

C. A. Hall, Secretary. (Corporate Seal.)

[fol. 820] By-Laws of Carter Coal Company

[fol. 821] Carter Coal Company

By-Laws

Article I

Section 1. Seal.—The corporate seal of Carter Coal Company (hereinafter called the Corporation) shall consist of a metallic stamp, circular in form, bearing in its center the word "Incorporated" and the figures "1912" and on the outer edge the name of the Corporation and the word "Delaware".

Article II

Section 1. Principal Office.—The principal office of the Corporation in the State of Delaware shall be in the City of Wilmington, County of Newcastle, and the name of the resident agent therein and in charge thereof shall be Delaware Registration Trust Company.

Section 2. Other Offices.—The Corporation may also have an office or offices at such other place or places, either within or without the State of Delaware, as the Board of Directors may from time to time determine or the business of [fol. 822] the Corporation require.

Article III

Shares and Certificates

Section 1. Certificates for Shares.—Each certificate for shares of the Corporation shall plainly state the number of

shares which it represents, and shall be in such form as shall be approved by the Board of Directors. The certificates for shares shall be numbered in the order of their issue, shall be signed by the President or Vice-President and by the Treasurer or an Assistant Treasurer or the Secretary or an Assistant Secretary, and the seal of the Corporation shall be affixed thereto.

Section 2. Transfer of Shares.—Certificates for shares of the capital stock of the Corporation shall be transferable on the stock books of the Corporation by the holder thereof, or by his attorney thereunto authorized by a power of attorney duly executed and acknowledged and filed with the Secretary of the Corporation, and on surrender of the certificate or certificates for such shares. Every certificate surrendered to the Corporation shall be marked "Cancelled", with the date of cancellation. The person in whose name shares of stock stand upon the books of the Corporation shall be deemed to be the owner thereof for all purposes as regards the Corporation. No transfer of shares [fol. 823] shall be valid as against the Corporation, its stockholders and creditors for any purpose, except to render the transferee liable for the debts of the Corporation to the extent provided by law, until it shall have been entered in the share records of the Corporation. The Board of Directors may also make such additional rules and regulations as it may deem expedient concerning the issue and transfer of certificates for shares of the capital stock of the Corporation and may make such rules as it may deem expedient concerning the issue of certificates in lieu of certificates alleged to have been lost, destroyed or mutilated.

Section 3. Closing of Transfer Books.—The Board of Directors may close the stock transfer books of the Corporation for a period not exceeding fifty days preceding the date of any meeting of stockholders or the date for payment of any dividend or the date for the allotment of rights or the date when any change or conversion or exchange of capital stock shall go into effect, or for any other purpose deemed desirable by the Board of Directors; provided, however, that in lieu of closing the stock transfer books as aforesaid, the Board of Directors may fix in advance a date, not exceeding fifty days preceding the date of any meeting of stockholders or the date for the payment of any [fol. 824] dividend, or the date for the allotment of rights,

or the date when any change or conversion or exchange of capital stock shall go into effect, as a record date for the determination of the stockholders entitled to notice of, and to vote at, any such meeting, or entitled to receive payment of any such dividend, or to any such allotment of rights, or to exercise the rights in respect of any such change, conversion or exchange of capital stock, and in such case such stockholders and only such stockholders as shall be stockholders of record on the date so fixed shall be entitled to such notice of, and to vote at, such meeting, or to receive payment of such dividend, or to receive such allotment of rights, or to exercise such rights, as the case may be, notwithstanding any transfer of any stock on the books of the Corporation after any such record date fixed as aforesaid.

Section 4. Dividends, Surplus, etc.—Subject to the provisions of the Certificate of Incorporation of the Corporation, the Board of Directors may (1) declare dividends on the shares of the Corporation whenever and in such amounts as, in its opinion, the condition of the affairs of the Corporation shall render it advisable, (2) use and apply, in its discretion, any of the surplus of the Corporation in purchasing or acquiring in accordance with law any of the shares of the Corporation or any of its bonds, debentures, [fol. 825] notes, scrip or other securities or evidences of indebtedness and (3) set aside from time to time out of such surplus such sum or sums as it, in its absolute discretion, may think proper, as a reserve fund to meet contingencies or for equalizing dividends or for the purpose of maintaining or increasing the property or business of the Corporation or for any other purpose it may think conducive to the best interests of the Corporation.

Article IV

Stockholders

Section 1. Annual Meetings.—A meeting of the stockholders of the Corporation having voting powers shall, after the year 1933, be held on the third Wednesday in March in each year or, if a legal holiday, on the first day thereafter not a legal holiday, for the purpose of electing directors for the ensuing year and for the transaction of

such other business as may properly be brought before the meeting.

Section 2. Special Meetings.—A special meeting of the stockholders (except in special cases regulated by statute) may be called at any time by the President or a Vice-President or by the Board of Directors, and shall be so called on the written request of holders of record of at least one-fifth of the number of shares of the Corporation then out- [fol. 826] standing and entitled to vote, which written request shall state the objects of such meeting. If such meeting shall not be called within five days after such request shall have been delivered at the office of the Corporation, the stockholders signing such request may appoint a chairman, who may be designated in such request and who may call a meeting by notice given as provided in the following section.

Section 3. Notice of Meetings.—Except as hereinafter in this Section provided or as may be otherwise required by law, notice of the time and place of holding each annual and special meeting of the stockholders shall be in writing and shall be delivered personally or mailed in a postage prepaid envelope, not less than ten days before such meeting, to each person who appears on the books of the Corporation as a stockholder entitled to vote at such meeting, and, if mailed, it shall be directed to such stockholder at his address as it appears on such books unless he shall have filed with the Secretary of the Corporation a written request that notices intended for him be mailed to some other address, in which case it shall be mailed to the address designated in such request. The notice of every special meeting, besides stating the time and place of such meeting, shall state briefly the purpose or purposes thereof, and no business other than that specified in such notice or germane [fol. 827] thereto shall be transacted at the meeting, except with the unanimous consent in writing of the holders of record of all the shares of the Corporation entitled to vote at such meeting. Notice of any meeting of stockholders need not be given to any stockholder, however, if waived by him, whether before or after such meeting be held, in writing or by telegraph, cable, radio or wireless, or if he shall attend such meeting in person or by proxy. Notice of any adjourned meeting need not be given.

Section 4. Place of Meeting.—All meetings of the stockholders of the Corporation shall be held at its principal office in the State of Delaware, or at such other place within or without the State of Delaware as may from time to time be fixed by the Board of Directors or as shall be specified or fixed in the respective notices or waivers of notice thereof; provided, however, that no change in the place of holding the annual meeting for the election of directors shall be made within sixty days next before the day on which the election is to be held.

Section 5. Stockholders Entitled to Vote.—Except where the transfer books of the Corporation shall have been closed or a date shall have been fixed as a record date for the determination of its stockholders entitled to vote, as provided in Section 3 of Article III of these By-Laws, no [fol. 828] share of stock shall be voted on at any election for directors which shall have been transferred on the books of the Corporation within twenty days next preceding such election of directors.

It shall be the duty of the officer who shall have charge of the stock ledger of the Corporation to prepare and make, at least ten days before every election of directors, a complete list of the stockholders entitled to vote at said election, arranged in alphabetical order. Such list shall be open at the place where said election is to be held for said ten days, to the examination of any stockholder, and shall be produced and kept at the time and place of election during the whole time thereof, and subject to the inspection of any stockholder who may be present.

Section 6. Quorum—At all meetings of the stockholders of the Corporation, except as otherwise provided by law, the holders of a majority of the outstanding shares of the Corporation, present in person or by proxy and entitled to vote thereat, shall constitute a quorum for the transaction of business. In the absence of a quorum a majority in interest of the stockholders so present or represented and entitled to vote may adjourn the meeting from time to time and from place to place until a quorum shall be obtained. At any such adjourned meeting at which a quo- [fol. 829] rum shall be present any business may be transacted which might have been transacted at the meeting as originally called.

Section 7. Organization.—At each meeting of the stockholders, the President or, in his absence, a Vice-President shall act as chairman of the meeting and the Secretary of the Corporation or, in his absence, one of the Assistant Secretaries of the Corporation shall act as secretary of the meeting. In case at any meeting none of the officers who have been designated to Act as chairman or secretary of the meeting, respectively, shall be present, a chairman or a secretary of the meeting, as the case may be, shall be chosen by a majority in interest of the stockholders present in person or by proxy and entitled to vote at such meeting.

Section 8. Voting.—At each meeting of the stockholders each stockholder of record entitled to vote thereat shall be entitled to one vote for each share standing in his name on the books of the Corporation. Persons holding shares in a fiduciary capacity shall be entitled to vote the shares so held and persons whose shares shall be pledged shall be entitled to vote such shares unless in the transfer by the pledgor on the books of the Corporation he shall have expressly empowered the pledgee to vote thereon, in which [fol. 830] case only the pledgee, or his proxy, may represent said shares and vote thereon. The vote on shares may be given by the stockholder entitled thereto in person or by proxy duly appointed by an instrument in writing subscribed by such stockholder, or by his attorney thereunto duly authorized, and delivered to the secretary of the meeting; provided, however, that no proxy shall be valid after the expiration of three years from the date of its execution unless the stockholder executing it shall have specified therein the length of time it is to continue in force, which shall be for a period therein limited. At all meetings of the stockholders, a quorum being present, all matters, except as otherwise provided by law or by the Certificate of Incorporation of the Corporation or by these By-laws, shall be decided by a majority in interest of the stockholders of the Corporation present in person or by proxy and entitled to vote.

Article V

Board of Directors

Section 1. General Powers.—The property, affairs and business of the Corporation shall be managed by the Board of Directors.

Section 2. Number, Term of Office and Qualifications.—The Board of Directors shall consist of three directors, who [fol. 831] need not be stockholders of the Corporation. Each director shall continue in office until his term shall have expired and until his successor shall have been elected and shall have qualified or until his death or removal or until he shall have resigned. In case the number of directors shall be increased, additional directors shall be elected as provided in Section 7 of this Article V.

Section 3. Election of Directors.—Except as otherwise provided by law or by these By-Laws, at each meeting of the stockholders for the election of directors at which a quorum shall be present, the persons receiving a plurality of the votes cast shall be directors.

Section 4. Organization.—At each meeting of the Board of Directors, the President or, in his absence, a Vice-President or, in the absence of the President and Vice-Presidents, a chairman chosen by the majority of the directors present shall preside. The Secretary of the Corporation shall act as secretary of the Board of Directors. In case the Secretary shall be absent from any meeting of the Board of Directors, an Assistant Secretary shall perform the duties of the Secretary at such meeting and in case the Secretary and the Assistant Secretaries shall be absent from any meeting of the Board of Directors the Chairman may appoint any person to act as secretary of the meeting.

[fol. 832] Section 5. Resignations.—Any director of the Corporation may resign at any time by giving written notice to the President or to the Secretary of the Corporation. Such resignation shall take effect at the date of the receipt of such notice or at any later time specified therein, and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

Section 6. Removal.—Any director may be removed with or without cause at any time by the affirmative vote of the majority in interest of the stockholders of record of the Corporation entitled to vote, given at a special meeting of the stockholders called for the purpose or at any annual meeting of stockholders; and the vacancy in the Board caused by such removal may be filled by the stockholders at such meeting.

Section 7. Vacancies.—Any vacancy in the Board of Directors (whether because of death, resignation, disqualification, an increase in the number of directors, removal or any other cause) may be filled either by the Board of Directors at any regular or special meeting thereof, by the vote of a majority of the directors in office at the time of such meeting or by the stockholders at the next annual meeting or any special meeting called for the purpose, and the director or directors so elected shall hold office for a term to ex-
[fol. 833] pire at the next annual election of directors or until his or their successor or successors shall be duly elected and qualified.

Section 8. Place of Meetings.—The Board of Directors may hold its meetings, have one or more offices and may keep the books and records of the Corporation, except as may be otherwise required by the laws of Delaware, at such place or places within or without the State of Delaware as the Board may from time to time by resolution determine.

Section 9. Annual Meetings.—After each annual election of directors, the newly elected directors may meet for the purpose of organization, the election of officers and the transaction of other business at such place and time as shall be fixed by the stockholders at the annual meeting or by written consent of the directors, or upon such notice as is hereinafter in Section 11 of this Article V provided for special meetings of the Board of Directors.

Section 10. Regular Meetings.—Regular meetings of the Board of Directors shall be held at such times and places as the Board shall by resolution determine. Notice of regular meetings need not be given. If any day fixed for a regular meeting shall be a legal holiday, then such meeting which would otherwise be held on that day shall be held at the same

[fol. 834] hour and place on the next succeeding secular day not a legal holiday.

Section 11. Special Meetings.—Special meetings of the Board of Directors shall be held whenever called by the President or two of the directors. Notice of each special meeting shall be mailed to each director, addressed to him at his residence or usual place of business at least two (2) days before the day on which the meeting is to be held, or shall be sent to him at such place by telegraph, cable, radio or wireless, or be delivered personally or by telephone at least 24 hours prior to the time fixed for the meeting. Every such notice shall state the time and place but need not state the purposes, of the meeting. Notice of any such meeting need not be given to any director, however, if waived by him, whether before or after such meeting be held, in writing or by telegraph, cable, radio, or wireless, or if he shall attend such meeting in person, and any meeting of the Board of Directors shall be a legal meeting without any notice thereof having been given if all of the directors shall be present thereat.

Section 12. Quorum and Manner of Acting.—A majority of the directors in office at the time of any regular or special meeting of the Board of Directors shall constitute a quorum for the transaction of business at such meeting, provided [fol. 835] that in no case shall a quorum be less than one-third of the total number of directors nor less than two. The act of a majority of the directors present at any meeting at which a quorum is present shall be the act of the Board of Directors. In the absence of a quorum, a majority of the directors present may, without notice other than announcement at the meeting, adjourn the meeting from time to time until a quorum be had.

Section 13. Fees.—Each director shall be paid such fee, if any, as shall be fixed by the Board of Directors, for each meeting of the Board which he shall attend and in addition his transportation and other expenses actually incurred by him in going to the meeting and returning therefrom.

Article VI

Officers

Section 1. Number.—The officers of the Corporation shall be the President, one or more Vice-Presidents, the Secretary and the Treasurer, who shall be elected by the Board of Directors, and such Assistant Secretaries, Assistant Treasurers, and special subordinate officers as may from time to time be elected or appointed by the Board of Directors or appointed by the President.

Any two of the above offices may be held by the same [fol. 836] person.

All of the officers of the Corporation shall hold office for one year and until others are elected or appointed and qualified in their stead, unless in the election or appointment of the officer it shall be specified that he holds his office for a shorter period or subject to the pleasure of the Board of Directors or President.

All vacancies in such offices by resignation, death, removal or otherwise may be filled by the Board of Directors.

Section 2. The President.—The President shall be a Director and shall be the chief executive officer of the Corporation. He shall preside at all meetings of the stockholders and, at all meetings of the Board of Directors. He shall have general and active management of the business of the Corporation, shall see that all orders and resolutions of the Board are carried into effect, shall be ex-officio a member of all standing committees, and shall have the general powers and duties of supervision and management usually vested in the office of President of a corporation.

He shall submit a report of the operations of the Corporation for the fiscal year to the stockholders at their annual meeting and from time to time shall report to the Directors all matters within his knowledge which the interests of the Corporation may require to be brought to [fol. 837] their notice.

Section 3. Vice-Presidents.—The Vice-Presidents shall perform such duties as the Board of Directors shall, from time to time, require. In the absence or incapacity of the President, the Vice-President designated by the President or the Board of Directors shall exercise the powers and duties of the President.

Section 4. The Treasurer.—The Treasurer shall be the financial officer of the Corporation, shall keep all and accurate accounts of receipts and disbursements in books belonging to the Corporation, shall deposit all moneys and other valuables in the name and to the credit of the Corporation, in such depositories as may be directed by the Board of Directors, shall disburse the funds of the Corporation as may be ordered by the Board or the President, taking proper vouchers therefor, and shall render to the President and Directors at all regular meetings of the Board or whenever they may require it and to the annual meetings of the stockholders an account of all his transactions as Treasurer and of the financial condition of the Corporation.

He shall also perform such other duties as the Board of Directors may from time to time require.

If required by the Board of Directors he shall give the [fol. 838] Corporation a bond in a form and in a sum with surety satisfactory to the Board of Directors for the faithful performance of the duties of his office and the restoration to the Corporation in the case of his death, resignation or removal from office of all books, papers, vouchers, money and other property of whatever kind in his possession belonging to the Corporation.

At the request of the Treasurer, or in his absence or inability to act, the Assistant Treasurer or, if there be more than one, the Assistant Treasurer designated by the Treasurer, shall perform the duties of the Treasurer and when so acting shall have all the powers of and be subject to all the restrictions of the Treasurer. The Assistant Treasurers shall perform such other duties as may from time to time be assigned to them by the President, the Treasurer, or the Board of Directors.

Section 5. The Secretary.—The Secretary shall attend all meetings of the Board of Directors and of the stockholders and act as Clerk thereof and record all votes and the minutes of all proceedings in a book to be kept for that purpose, and shall perform like duties for the standing committees when required.

He shall keep in safe custody the seal of the Corporation and, when authorized by the Board, affix the seal to any [fol. 839] instrument requiring the same.

He shall see that proper notice is given of all meetings of the stockholders of the Corporation and of the Board

of Directors and shall perform such other duties as may be prescribed from time to time by the Board of Directors or by the President.

At the request of the Secretary, or in his absence or inability to act, the Assistant Secretary or, if there be more than one, the Assistant Secretary designated by the Secretary, shall perform the duties of the Secretary and when so acting shall have all the powers of and be subject to all the restrictions of the Secretary. The Assistant Secretaries shall perform such other duties as may from time to time be assigned to them by the President, the Secretary, or the Board of Directors.

Section 6. Delegation of Powers, Duties, Etc.—In the case of absence or inability to act of any officer of the Corporation, and of any person herein authorized to act in his place, the Board of Directors may from time to time delegate the powers or duties of such officer to any other officer or any director or other person whom they may select.

Section 7. Removal.—Any officer of the Corporation may be removed, either with or without cause, at any time, by resolution adopted by the Board of Directors at a special [fol. 840] meeting of the Board called for that purpose, or by any Committee or superior officer upon whom such power of removal may be conferred by the Board of Directors.

Article VII

Contracts, Checks, Notes, etc.

All contracts and agreements authorized by the Board of Directors shall, unless otherwise directed by the Board of Directors, or unless otherwise required by law, be signed by any two of the following officers: President, Vice-President, Treasurer or Secretary, and all checks, drafts, notes, bonds, bills of exchange and orders for the payment of money shall be signed by such officers as shall from time to time be fixed by resolution of the Board of Directors.

Article VIII

Fiscal Year

The fiscal year of the Corporation shall begin on the first day of January of each year.